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1957

Queen's Bench Division

and on Appeal therefrom in the

Court of Appeal

and Decisions in

The Court of Criminal Appeal

Vol. 1

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[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

PAGE

A

Andrews *v.* Hopkinson - - 229
Ashdown *v.* Samuel Williams & Sons Ltd. - - - 409
Associated London Properties Ltd. *v.* Paddington Borough Council - - - - 294
Attorney-General, *Ex parte.* Regina *v.* Odhams Press Ltd. - - - - - 73
Attorney-General *v.* Bastow - 514

B

B. P. Refinery (Kent) Ltd. *v.* Kent River Board - - 84
B. P. Refinery (Kent) Ltd. *v.* Lower Medway Internal Drainage Board - - - 84
Baccus S.R.L. *v.* Servicio Nacional del Trigo - - 438
Balfour *v.* Barty-King. Hyder & Sons (Builders) Ltd., Third Parties - - - 496
Barnsley Corporation *v.* Lancashire County Council - 123
Barrett, *Ex parte.* Regina *v.* Flintshire County Council County Licensing (Stage Plays) Committee - - 350
Barty-King, Balfour *v.* Hyder & Sons (Builders) Ltd., Third Parties - - - 496
Bastow, Attorney-General *v.* 514
Beevis *v.* Dawson - - - 195
Billings (A. C.) & Sons Ltd., Riden *v.* - - - - 46
Boaks *v.* Reece - - - 219
Bolton (H. L.) (Engineering) Co. Ltd. *v.* T. J. Graham & Sons Ltd. - - - - 159

PAGE

British Geon Ltd., Davies *v.* 1
Bryers *v.* Canadian Pacific Steamships Ltd. - - 134

C

Canadian Pacific Steamships Ltd., Bryers - - - 134
Cardiff Corporation *v.* Robinson - - - - - 39
Central Newbury Car Auctions Ltd. *v.* Unity Finance Ltd. Mercury Motors, Third Parties - - - - 371
Church Commissioners for England, Driscoll *v.* - - 330
Church Commissioners for England *v.* Ve-Ri-Best Manufacturing Co. Ltd. - 238
Cole *v.* Somerset County Council - - - - 23
Crawley Development Corporation, Harvey *v.* - - 485

D

Davies *v.* British Geon Ltd. - 1
Dawson, Beevis *v.* - - 195
Driscoll *v.* Church Commissioners for England - - 330

E

Evans, Regina *v.* - - - 35

F

Flintshire County Council County Licensing (Stage Plays) Committee, Regina *v.* *Ex p.* Barrett - - 350

PAGE

G

Gilmore, *Ex parte*. Regina *v*. Medical Appeal Tribunal - 574
Graham (T. J.) & Sons Ltd., H. L. Bolton (Engineering) Co. Ltd. *v*. - - - 159

H

Hallam, Regina *v*. - - 569
Harvey *v*. Crawley Development Corporation - - 485
Hopgood, Morris Motors Ltd. *v*. - - - - - 30
Hopkinson, Andrews *v*. - 229
Hornal *v*. Neuberger Products Ltd. - - - - - 247
Huddersfield Corporation, West Riding County Council *v*. - - - - - 540

J

Jacmarch Properties Ltd., Percy E. Cadle & Co. Ltd. *v*. - - - - - 323
Johnson, Regina *v*. - - 552
Joseph Rank Ltd., St. John Shipping Corporation *v*. - 267

K

Kemp, Regina *v*. - - - 399
Kent River Board, B. P. Refinery (Kent) Ltd. *v*. - - 84
Knight *v*. Lambrick Contractors Ltd. - - - - 562

L

Lambrick Contractors Ltd., Knight *v*. - - - - 562
Lancashire County Council, Barnsley Corporation *v*. - 123
Lewis, McCarthy *v*. - - 475
Lobell, Regina *v*. - - - 547
Lower Medway Internal Drainage Board, B. P. Refinery (Kent) Ltd. *v*. - - - 84

M

McCarthy *v*. Lewis - - 475
Medical Appeal Tribunal, Regina *v*. *Ex parte* Gilmore 574

PAGE

Mercury Motors, Third Parties. Central Newbury Car Auctions *v*. Unity Finance Ltd. 371
Morris Motors Ltd. *v*. Hopgood - - - - - 30

N

National Assistance Board *v*. Tugby - - - - 506
National Deposit Friendly Society Trustees *v*. Skegness Urban District Council - 531
Neuberger Products Ltd., Hornal *v*. - - - - 247
Northfield (Highgate) Ltd., *Ex parte*. Regina *v*. Tottenham and District Rent Tribunal - - - - 103

O

Odhams Press Ltd., Regina *v*. *Ex parte* Attorney-General 73
Owen, Regina *v*. - - - 174

P

Paddington Borough Council, Associated London Properties Ltd. *v*. - - - 294
Paddington Borough Council *v*. War Damage Commission 294
Percy E. Cadle & Co. Ltd. *v*. Jacmarch Properties Ltd. - 323

R

Reece, Boaks *v*. - - - 219
Regina *v*. Evans - - - 35
Regina *v*. Flintshire County Council County Licensing (Stage Plays) Committee. *Ex parte* Barrett - - 350
Regina *v*. Hallam - - - 569
Regina *v*. Johnson - - 552
Regina *v*. Kemp - - - 399
Regina *v*. Lobell - - - 547
Regina *v*. Medical Appeal Tribunal. *Ex parte* Gilmore - 574
Regina *v*. Odhams Press Ltd. *Ex parte* Attorney-General 73
Regina *v*. Owen - - - 174
Regina *v*. Sharp - - - 552

PAGE

Regina *v.* Tottenham and District Rent Tribunal. *Ex parte* Northfield (Highgate) Ltd. - - - - - - 103
Riden *v.* A. C. Billings & Sons Ltd. - - - - - - 46
Robinson, Cardiff Corporation *v.* - - - - - - 39
Roland-Linie Schiffahrt G.m.b.H. *v.* Spillers Ltd. 109
Romford Borough Council, A. R. Wright & Son Ltd. *v.* 431

S

St. John Shipping Corporation *v.* Joseph Rank Ltd. - - 267
Samuel Williams & Sons Ltd., Ashdown *v.* - - - - 409
Secretary of State for Air, Tull's Personal Representatives *v.* - - - - - 523
Servicio Nacional del Trigo, Baccus S.R.L. *v.* - - 438
Sharp, Regina *v.* - - - - 552
Skegness Urban District Council, National Deposit Friendly Society Trustees *v.* 531
Somerset County Council, Cole *v.* - - - - - 23
Spillers Ltd., Roland-Linie Schiffahrt G.m.b.H. *v.* - 109

PAGE

T

Tottenham and District Rent Tribunal, Regina *v.* *Ex parte* Northfield (Highgate) Ltd. - - - - - - 103
Tugby, National Assistance Board *v.* - - - - - 506
Tull's Personal Representatives *v.* Secretary of State for Air - - - - 523

U

Unity Finance Ltd., Central Newbury Car Auctions Ltd. *v.* Mercury Motors, Third Parties - - - - 371

V

Ve-Ri-Best Manufacturing Co. Ltd., Church Commissioners for England *v.* - - - 238

W

War Damage Commission, Paddington Borough Council *v.* - - - - - 294
West Riding County Council *v.* Huddersfield Corporation 540
Wright (A. R.) & Son Ltd. *v.* Romford Borough Council - 431

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			Page
Aberystwith Promenade Pier Co. *v.* Cooper	35 L.J.Q.B. 44	*R.*	16, 21
Abigail *v.* Lapin	[1934] A.C. 491	*R.*	383, 390, 391
Adams *v.* Great Western Railway Co.	30 L.J.Ex. 124	*Dist.*	2, 12, 15, 20
Alexander *v.* H. Burgoine & Sons Ltd.	[1939] 4 All E.R. 568	*C.*	196, 208
Alexander *v.* Railway Executive	[1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442		273
Aktiebolaget Nordeska Lloyd *v.* J. Brownlie & Co. (Hull) Ltd.	30 Com.Cas. 307; 41 T.L.R. 503; 21 Ll.L.Rep. 128		115
Anderson Ltd. *v.* Daniel	[1924] 1 K.B. 138; 40 T.L.R. 61	*E.*	268, 282–284
Andreas Vergottis *v.* Robinson, David & Co. Ltd.	31 Ll.L.Rep. 23		115
Anglo-Danubian Transport Co. Ltd. *v.* Ministry of Food	65 T.L.R. 762; [1949] 2 All E.R. 1068; 83 Ll.L. Rep. 137		114
Anon.	Cro.Eliz. 10		497
Armstrong *v.* Strain	[1951] 1 T.L.R. 856; [1952] 1 K.B. 232; [1952] 1 T.L.R. 82; [1952] 1 All E.R. 139		255
Ashdown *v.* Samuel Williams & Sons Ltd.	[1956] 2 Q.B. 580; [1956] 2 All E.R. 384	*Varied* *C.*	410 439, 455–460,
Associated Cinema Properties Ltd. *v.* Hampstead Borough Council	[1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 346		42
Associated London Properties Ltd. *v.* War Damage Commission, Paddington Borough Council and Church Commissioners for England	Judgments of the Court of Appeal, 1954, No. 199A	*R.*	305
Atkinson *v.* Bettison	[1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340		326
Atkinson *v.* Morgan	[1915] 3 K.B. 23	*F.*	476, 482, 483
Attorney-General *v.* Alexander	L.R. 10 Ex. 20	*R.*	21
Attorney-General *v.* Ashborne Recreation Ground Company	[1903] 1 Ch. 101; 19 T.L.R. 39	*F.*	514, 519
Attorney-General *v.* Cockermouth Local Board	L.R. 18 Eq. 172	*R.*	520
Attorney-General *v.* Wimbledon House Estate Co. Ltd.	[1904] 2 Ch. 34; 20 T.L.R. 489	*R.*	519
Attorney-General and Spalding Rural District Council *v.* Garner	[1907] 2 K.B. 480; 23 T.L.R. 563		516
Austin *v.* Guardians of Bethnal Green	L.R. 9 C.P. 91		435
Austin Reed Ltd. *v.* Royal Assurance Co. Ltd.	Judgmts. of Ct. of Appl., 1956, 217a	*R.*	171
B. & B. Viennese Fashions *v.* Losane	[1952] 1 T.L.R. 750; [1952] 1 All E.R. 909	*R.*	284

Babcock *v.* Lawson	4 Q.B.D. 394	*R.*	382
Baker *v.* Lewis	[1947] K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 592	*R.*	169
Balfour *v.* Barty-King	[1956] 1 W.L.R. 779; [1956] 2 All E.R. 555	*Aff.*	497
Ball *v.* London County Council	[1949] 2 K.B. 159; 65 T.L.R. 533; [1949] 1 All E.R. 1056	*N.F.*	47, 57
Banco de Vizcaya *v.* Don Alfonso de Borbon y Austria	[1935] 1 K.B. 140; 50 T.L.R. 284		182
Bater *v.* Bater	[1951] P. 35; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458	*Appl.*	247, 258, 263, 266
Beard *v.* Porter	[1948] 1 K.B. 321; 63 T.L.R. 543; [1947] 2 All E.R. 407	*Appl.*	485, 492, 495
Beaulieu *v.* Finglam	Y.B. 2 Hen. IV, fo. 18, pl. 6	*C.*	497, 502
Beevis *v.* Dawson	[1956] 2 Q.B. 165; [1956] 2 All E.R. 371	*Rev.*	196
Belton *v.* London County Council	9 T.L.R. 232	*Appl.*	524, 528, 530
Bendall *v.* McWhirter	[1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307		43
Bensley *v.* Bignold	5 B. & Ald. 335		273
Beresford *v.* Royal Insurance Co. Ltd.	[1937] 2 K.B. 197; 53 T.L.R. 583; [1937] 2 All E.R. 243; [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602	*Dist.*	268, 292, 293
Berg *v.* Sadler and Moore	[1937] 2 K.B. 158; 53 T.L.R. 430; [1937] 1 All E.R. 637		277
Betty's Cafés Ltd. *v.* Phillips Furnishing Stores Ltd.	[1956] 1 W.L.R. 678; [1956] 2 All E.R. 497; [1956] 3 W.L.R. 1134; [1957] Ch. 67; [1957] 1 All E.R. 1		326
Betty's Cafés Ltd. *v.* Phillips Furnishing Stores Ltd.	[1956] 1 W.L.R. 678; [1956] 2 All E.R. 497; [1956] 3 W.L.R. 1134		165
Bishopsgate Motor Finance Corporation Ltd. *v.* Transport Brakes Ltd.	[1949] 1 K.B. 322; 65 T.L.R. 66; [1949] 1 All E.R. 37	*R.*	392
Black *v.* Christchurch Finance Co.	[1894] A.C. 48	*R.*	504
Blundell *v.* Rex	[1905] 1 K.B. 516; 21 T.L.R. 143		526
Boaks *v.* Reece	[1956] 1 W.L.R. 886; [1956] 2 All E.R. 750	*Aff.*	219
Boyce *v.* Chapman and Brown	2 Bing.N.C. 222	*R.*	261

Bracegirdle *v.* Oxley	[1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126	*R.*	341
Bradford Old Bank *v.* Sutcliffe	[1918] 2 K.B. 833; 34 T.L.R. 299		542
Bradlaugh, *Ex p.*	3 Q.B.D. 509	*R.*	586
Breull, *Ex p.*	16 Ch.D. 484	*R.*	16
Brown *v.* Cotterell	51 T.L.R. 21	*R.*	56
Brown *v.* London and North Western Railway Co.	32 L.J.Q.B. 318	*Dist.*	2, 12, 16, 21
Brown *v.* Sheen & Richmond Car Sales Ltd.	[1950] 1 All E.R. 1102	*Appl.*	230, 235, 237
Browne *v.* La Trinidad	37 Ch.D. 1; 4 T.L.R. 14		167
Browne *v.* Murray	Ry. & M. 254	*C.*	195, 203, 215, 216
Bryers *v.* Canadian Pacific Steamships Ltd.	[1956] 1 W.L.R. 1181; [1956] 3 All E.R. 242	*Aff.*	135
Buckland *v.* Guildford Gas Light & Coke Co.	[1949] 1 K.B. 410; [1948] 2 All E.R. 1086	*R.*	56
Candler *v.* Crane, Christmas & Co.	[1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426		51
Carroll *v.* Andrew Barclay & Sons Ltd.	[1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386	*R.*	34
Cavalier *v.* Pope	[1906] A.C. 428		53
Central Land Board *v.* Saxone Shoe Co. Ltd.	[1955] 3 W.L.R. 614; [1955] 3 All E.R. 415		304
Cesena Sulphur Co. Ltd. *v.* Nicholson	1 Ex.D. 428	*R.*	20, 21
Chalmers *v.* Shackell	6 C. & P. 475		253
Chan Kau *v.* The Queen	[1955] A.C. 206; [1955] 1 All E.R. 266	*Appl.*	548, 550
Christmas *v.* General Cleaning Contractors Ltd.	[1952] 1 K.B. 141		414
Church *v.* Imperial Gas Light & Coke Co.	6 Ad. & El. 846	*R.*	435–437
Cilia *v.* H. M. James & Sons	[1954] 1 W.L.R. 721; [1954] 2 All E.R. 9		414
Clarke *v.* Cuckfield Union	21 L.J.Q.B. 349	*R.*	436
Clark's Trust, *In re*	1 Ch.D. 497		535
Clayards *v.* Dethick	12 Q.B. 439	*Appl.*	47, 55, 59, 65–67
Clelland *v.* Edward Lloyd Ltd.	[1938] 1 K.B. 272; 53 T.L.R. 644; [1937] 2 All E.R. 605	*R.*	56
Clift *v.* Taylor	[1948] 2 Q.B. 394; 64 T.L.R. 346; [1948] 2 All E.R. 113		104
Coale *v.* Société Co-op. Suisse Des Charbons, Basle, D.C.	21 Fed. 2d. 180	*R.*	462
Commissioners of Sewers *v.* Cheffings	23 R. & I.T. 52	*R.*	93
Commonwealth Trust *v.* Akotey	[1926] A.C. 72	*R.*	383
Compagnie Générale Transatlantique *v.* Thomas Law & Co.	[1899] A.C. 431; 15 T.L.R. 424	*R.*	19
Compania Mercantil Argentina *v.* United States Shipping Board	93 L.J.K.B. 816; 40 T.L.R. 601	*R.*	468
Compania Naviera Vascongado *v.* S.S. Cristina	[1938] A.C. 485 . 54 T.L.R. 512	*R.*	460, 469

Cooke *v.* Midland Great Western Railway of Ireland	[1909] A.C. 229; 25 T.L.R. 375		50
Cooper *v.* Slade	6 H.L.C. 746	*R.*	261
Cope *v.* Rowlands	2 M. & W. 149	*Appl.*	268, 284, 285, 287, 288
Corby *v.* Hill	4 C.B.N.S. 556	*R.*	55, 64
Couchman *v.* Hill	[1947] K.B. 554; 63 T.L.R. 81; [1947] 1 All E.R. 103		251
Creed *v.* McGeoch & Sons Ltd.	[1955] 1 W.L.R. 1005; [1955] 3 All E.R. 123	*R.*	56
Cremin *v.* Thomson	74 Ll.L.Rep. 1	*R.*	54
Crippen, In the Estate of	[1911] P. 108; 27 T.L.R. 258		277
Crosse *v.* Gardner	Carth. 90	*Appl.*	229, 235
Cundell *v.* Dawson	4 C.B. 376		273
Cunnack *v.* Edwards	[1896] 2 Ch. 679; 12 T.L.R. 614		536
Dalton *v.* Angus	6 App.Cas. 740	*R.*	505
D'Arcy *v.* Tamar, Kit Hill and Callington Railway Co.	L.R. 2 Ex. 158		168
Darrall *v.* Whitaker	92 L.J.K.B. 882		326
Davidson *v.* Handley Page Ltd.	61 T.L.R. 178; [1945] 1 All E.R. 235		415
Davies *v.* British Geon Ltd.	[1956] 1 W.L.R. 769; [1956] 2 All E.R. 404	*Rev.*	2
Davies *v.* May	[1937] 2 K.B. 260; 53 T.L.R. 656; [1937] 2 All E.R. 582	*F.*	476, 483
Davis *v.* Foots	[1940] 1 K.B. 116; 56 T.L.R. 54; [1939] 4 All E.R. 4	 *R.*	53 425, 429
Davis *v.* St. Mary's Demolition and Excavation Co. Ltd.	[1954] 1 W.L.R. 592; [1954] 1 All E.R. 578	*R.*	56
De Beers Consolidated Mines Ltd. *v.* Howe	[1905] 2 Q.B. 612; [1906] A.C. 455; 22 T.L.R. 756	*R.*	14, 19, 21
De Haber *v.* Queen of Portugal	17 Q.B. 171	*R.*	473
Demetriades & Co. *v.* Northern Assurance Co.	17 Ll.L.Rep. 327		255
Dendy *v.* Evans	[1910] 1 K.B. 263	*Appl.*	331, 340, 343, 348
Dendy *v.* Wallis	Unreported	*R.*	343
Denton Road, No. 56, Twickenham, *In re*	[1953] Ch. 51; [1952] 2 T.L.R. 676; [1952] 2 All E.R. 99		302
Devonport Corporation *v.* Tozer	[1903] 1 Ch. 759; 19 T.L.R. 257		516
Dexter and Carpenter *v.* Kunglig Jarnvagsstyrelsen	43 Fed. 2d. 705	*R.*	463
Diploma Laundry Ltd. *v.* Surrey Timber Co. Ltd.	[1955] 2 Q.B. 604; [1955] 2 All E.R. 922		164
Donoghue *v.* Stevenson	[1932] A.C. 562; 48 T.L.R. 494	*R.*	236
Donoghue *v.* Stevenson	[1932] A.C. 562; 48 T.L.R. 494	*R.*	53, 57, 64, 73
Donovan *v.* Cammell Laird & Co.	[1949] 2 All E.R. 82	*N.F.*	135, 144, 156
Drury *v.* Victor Buckland Ltd.	[1941] 1 All E.R. 269	*R.*	237

Dunlop Pneumatic Tyre Co. Ltd. *v.* Actien-Gesellschaft für Motor und Motorfahrzengbau vorm. Cudell & Co.	[1902] 1 K.B. 342	*Appl.*	2, 13, 17
Dunster *v.* Abbott	[1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572	*R.*	56
East End Dwellings Co. Ltd. *v.* Finsbury Borough Council	[1952] A.C. 109; [1951] 2 T.L.R. 486; [1951] 2 All E.R. 587	*C.*	297, 314–316, 322
Ebersley Hotel Co., *In re*	[1884] W.N. 252		6
Edwards (Inspector of Taxes) *v.* Bairstow	[1956] A.C. 14; [1955] 3 All E.R. 48	*R.*	582
Egerton *v.* Jones	[1939] 2 K.B. 702; 55 T.L.R. 1089; [1939] 3 All E.R. 889	*R.*	246
Eisinger *v.* General Accident Fire and Life Assurance Corporation Ltd.	[1955] 1 W.L.R. 869; [1955] 2 All E.R. 897	*R.*	384
Elfie A. Issaias *v.* Marine Insurance Co. Ltd.	13 Ll.L.Rep. 381; 14 Ll.L.Rep. 1; 15 Ll.L.Rep. 186	*R.*	258
Excelsior Wire Rope Co. Ltd. *v.* Callen	[1930] A.C. 404		5
Exchange, The	7 Cranch 116	*R.*	460
Farquharson Bros. & Co. *v.* King & Co.	[1902] A.C. 325; 18 T.L.R. 665	*C.*	372, 380, 388, 389, 395, 396
Fender *v.* St. John-Mildmay	[1938] A.C. 1; 53 T.L.R. 885; [1937] 3 All E.R. 402		274
Field *v.* Receiver of Metropolitan Police	[1907] 2 K.B. 853; 23 T.L.R. 736	*C.*	553, 560
Filliter *v.* Phippard	11 Q.B. 347	*R.*	504
Fisher *v.* Taylors Furnishing Stores Ltd.	[1956] 2 Q.B. 78; [1956] 2 All E.R. 78		326
Fitzwilliam (Earl) *v.* Inland Revenue Commissioners	[1914] A.C. 753	*Appl.*	524, 528
Fleet Electrics Ltd. *v.* Jacey Investments Ltd.	[1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99		167
Folkes *v.* King	[1923] 1 K.B. 282; 39 T.L.R. 77	*R.*	381, 382
Ford *v.* Receiver of Metropolitan Police	[1921] 2 K.B. 344; 37 T.L.R. 467		556
Forster *v.* Taylor	5 B. & Ad. 887	*R.*	291
Foster *v.* Driscoll	[1929] 1 K.B. 470; 45 T.L.R. 185		183
Foster's Case	11 Co.Rep. 56b, 64b	*R.*	583
Fuller *v.* Glyn, Mills, Currie & Co.	[1914] 2 K.B. 168; 30 T.L.R. 162	*R.*	381, 391
Gallagher *v.* Humphrey	6 L.T. 684	*R.*	421
Galloway *v.* Galloway	[1956] A.C. 299; [1955] 3 All E.R. 429		6
Gautret *v.* Egerton	L.R. 2 C.P. 371		50
Grand Junction Co. *v.* Bates	[1954] 2 Q.B. 160; [1954] 2 All E.R. 385	*R.*	245
Greene *v.* Chelsea Borough Council	[1954] 2 Q.B. 127; [1954] 2 All E.R. 318	*R.*	72
Grimwood *v.* Moss	L.R. 7 C.P. 360	*R.*	343

Groenvelt *v.* Burwell	1 Ld.Raym. 454	*R.*	584
Groves *v.* Lord Wimborne	[1898] 2 Q.B. 402	*C.*	135, 148, 154
Grundt *v.* Great Boulder Proprietary Gold Mines Ltd.	59 C.L.R. 641, 675	*R.*	380
Harling *v.* Eddy	[1951] 2 K.B. 739; [1951] 2 T.L.R. 245; [1951] 2 All E.R. 212		251
Haseldine *v.* Daw & Sons Ltd.	[1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156	*R.*	54, 55, 57
Hartley *v.* Mayoh & Co. Ltd.	[1954] 1 Q.B. 383; [1954] 1 All E.R. 375	*C.*	135, 147, 148, 157
Hartwell *v.* Grayson Rollo and Clover Docks Ltd.	[1947] K.B. 901	*R.*	143–145, 156
Hawkins *v.* Coulsdon and Purley U. D. C.	[1954] 1 Q.B. 319; [1954] 1 All E.R. 97	*C.*	47, 58, 64, 72
Haycraft Gold Reduction and Mining Co., *In re*	[1900] 2 Ch. 230; 16 T.L.R. 350		168
Heap *v.* Motorists' Advisory Agency Ltd.	[1923] 1 K.B. 577; 39 T.L.R. 150		376
Heilbut, Symons & Co. *v.* Buckleton	[1913] A.C. 30	*R.*	257
Henderson & Co. *v.* Williams	[1895] 1 Q.B. 521; 11 T.L.R. 148	*R.*	383, 390
Henderson's Conveyance, *In re*	[1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1	*R.*	347
Henson *v.* London and North Eastern Railway Co.	62 T.L.R. 369; [1946] 1 All E.R. 653	*C.* *R.*	410, 418, 419, 425, 428 469
Herbert *v.* Poland	44 Ll.L.Rep. 139		253
Herschtal *v.* Stewart & Ardern Ltd.	[1940] 1 K.B. 155; 56 T.L.R. 48; [1939] 4 All E.R. 123	*Appl.*	230, 236, 237
Highland Loch, The	[1912] A.C. 312; 28 T.L.R. 213		51
Hobbs *v.* Tinling (C. T.) & Co. Ltd.	[1929] 2 K.B. 1; 45 T.L.R. 328	*R.*	212
Honeywill & Stein *v.* Larkin Bros., etc.	[1934] 1 K.B. 191; 50 T.L.R. 56		498
Hood *v.* Anchor Line	[1918] A.C. 837		417
Horn *v.* Sunderland Corporation	[1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480	*F.* *Appl.*	485, 492, 494 524, 528, 529
Horsley Line Ltd. *v.* Roechling Bros.	1908 S.C. 866		115
Howard *v.* Fanshawe	[1895] 2 Ch. 581		335
Hudson's Bay Company *v.* Domingo Mumbru Societa Anonyma	9 Ll.L.Rep. 196; 10 Ll.L.Rep. 476		115
Hughes *v.* Percival	8 App.Cas. 443		499
Huntington *v.* Attrill	[1893] A.C. 150; 8 T.L.R. 341		178
Hurst *v.* Evans	[1917] 1 K.B. 352; 33 T.L.R. 96		254
Inland Revenue Commissioners *v.* Glasgow and South-Western Railway Co.	12 App.Cas. 315		489
Isle of Wight C. C. *v.* Warwickshire C. C.	[1953] 1 Q.B. 553; [1953] 1 All E.R. 525	*Appl.*	125, 132
Jarvis *v.* Surrey County Council	[1925] 1 K.B. 554; 41 T.L.R. 228		543

Jassy, The	[1906] P. 270	*Appl.*	439, 464, 470, 474
Jennings *v.* Kelly	[1940] A.C. 206; [1939] 4 All E.R. 464		137
Jerome *v.* Bentley & Co.	[1952] 2 T.L.R. 58; [1952] 2 All E.R. 114	*R.*	389
Joblin *v.* Watkins and Roseveare (Motors) Ltd.	64 T.L.R. 464; [1949] 1 All E.R. 47	*R.*	388
Johnson *v.* Credit Lyonnais Co.	3 C.P.D. 32	*R.*	381
John Summers & Sons *v.* Frost	[1955] A.C. 740; [1955] 1 All E.R. 870		564
Jones, *Ex p.*	13 Ves. 237	*Appl.*	74, 80, 83
Jones *v.* Carter	15 M. & W. 718	*R.*	343
Jones *v.* Scottish Accident Insurance Corporation	17 Q.B.D. 421		7
Jubb *v.* Hull Dock Company	9 Q.B. 443		489
Julius *v.* Lord Bishop of Oxford	5 App.Cas. 214	*R.*	342, 350
Kelantan Government *v.* Duff Development Co.	[1923] A.C. 395		452
Keynsham Blue Lias Lime Co. *v.* Baker	33 L.J.Ex. 41; 2 H. & C. 729	*Appl.*	2, 12, 13, 16, 20, 22
Kilkenny and Great Southern and Western Railway Co. *v.* Feilden	6 Ex. 81	*R.*	21
Kimber *v.* Gas Light & Coke Co.	[1918] 1 K.B. 439; 34 T.L.R. 260	*R.*	55, 64, 70
Krajina *v.* Tass Agency (of Moscow)	[1949] W.N. 309; [1949] 2 All E.R. 274	*C.*	439, 455–460, 466–468, 471, 472
Lansbury *v.* Riley	[1914] 3 K.B. 229; 29 T.L.R. 733	*R.*	562
Lawford *v.* Billericay Rural District Council	[1903] 1 K.B. 772; 19 T.L.R. 322	*R.*	436
Lax *v.* Darlington Corporation	5 Ex.D. 28		51
Leivers *v.* Barber, Walker & Co.	[1943] K.B. 385; 59 T.L.R. 195; [1943] 1 All E.R. 386		543
Lejzor Teper *v.* The Queen	[1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447		549
Lek *v.* Mathews	29 Ll.L.Rep. 141	*Appl.*	247, 258, 262
Lennard's Carrying Co. Ltd. *v.* Asiatic Petroleum Co. Ltd.	[1915] A.C. 705; 31 T.L.R. 294	*R.*	172
Leonis Steamship Co. Ltd. *v.* Rank Ltd.	[1908] 1 K.B. 499; 24 T.L.R. 128	*R.*	121
Le Tailleur *v.* South Eastern Railway Co.	3 C.P.D. 18	*R.*	16
Lewis (T.) *v.* L. Dreyfus & Co.	17 Ll.L.Rep. 112; 31 Com.Cas. 239		113
Lickbarrow *v.* Mason	2 Term R. 63	*C.*	372, 382, 383, 388, 389, 396
London and Globe Finance Corporation Ltd., *In re*	[1903] 1 Ch. 728; 19 T.L.R. 314	*R.*	187
London and Lancashire Fire Insurance Co. Ltd. *v.* Bolands Ltd.	[1924] A.C. 836; 40 T.L.R. 603	*R.*	560
London and North Eastern Railway Co. *v.* Berriman	[1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255		564
London County Council *v.* Attorney-General	[1902] A.C. 165; 18 T.L.R. 298	*R.*	520
London County Council *v.* Aylesbury Dairy Co. Ltd.	[1898] 1 Q.B. 106		104

London County Freehold and Leasehold Properties Ltd. *v.* Berkeley Property and Investment Co. Ltd.	[1936] 2 All E.R. 1039		252
London Graving Dock Co. Ltd. *v.* Horton	[1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1	*R.*	72, 73
London and North Eastern Railway Co. *v.* Berriman	[1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255		105
Louth Drainage Board *v.* Carey	85 S.J. 233		91
Ludditt *v.* Ginger Coote Airways Ltd.	[1947] A.C. 233; [1947] 1 All E.R. 328		416
Lyons *v.* Collins	[1937] 1 K.B. 353; 53 T.L.R. 140; [1936] 3 All E.R. 788	*R.*	100
McCawley *v.* Furness Railway Co.	L.R. 8 Q.B. 57	*R.*	425
McConnel *v.* Wright	[1903] 1 Ch. 546		252
Machado *v.* Fontes	[1897] 2 Q.B. 231; 13 T.L.R. 407		177
Maclaren & Sons *v.* Davis	6 T.L.R. 372		198
M'Naghten's Case	10 Cl. & Fin. 200; 4 St.Tr.N.S. 847	*C.*	399, 402 et seq.
Magor and St. Mellons R. D. C. *v.* Newport Corporation	[1952] A.C. 189; [1951] 2 All E.R. 839		137
Malone *v.* Laskey	[1907] 2 K.B. 141; 23 T.L.R. 399	*N.F.*	47, 56, 57
Mancini *v.* Director of Public Prosecutions	[1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272	*R.*	550
Mason *v.* Intercolonial Railway of Canada	197 Mass. 349	*R.*	463
Massey-Harris-Ferguson (Manufacturing) Ltd. *v.* Piper	[1956] 2 Q.B. 397	*R.*	137, 157
Marles *v.* Philip Trant & Sons	[1954] 1 Q.B. 29; [1953] 1 All E.R. 651	*R.*	282, 292
Medina *v.* Stoughton	1 Salk. 210	*Appl.*	229, 235
Mercantile Bank of India Ltd. *v.* Central Bank of India Ltd.	[1938] A.C. 287; 54 T.L.R. 208; [1938] 1 All E.R. 52	*R.*	380, 385, 389, 391
Metropolitan and Metropolitan District Railway Cos. *v.* Burrow	Cripps on Compensation, 8th ed., p. 906; The Times, Nov. 22, 1884	*F.*	485, 494
Metropolitan Music Hall Co. *v.* Lake	58 L.J.Ch. 513; 5 T.L.R. 329	*Dist.*	74, 82
Middleton *v.* Baldock	[1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708		42
Miller *v.* Minister of Pensions	[1947] W.N. 241; 63 T.L.R. 474; [1947] 2 All E.R. 372	*R.*	259
Mitchell *v.* Hender	23 L.J.Q.B. 273	*R.*	13
Monck *v.* Hilton	2 Ex.D. 268		536
Monmouth County Council *v.* Newport Corporation	175 L.T. 293		542
Mooney *v.* Lanarkshire C. C.	1954 S.C. 245	*R.*	56

Mooney *v.* Mooney	[1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812		508
Morelle Ltd. *v.* Wakeling	[1955] 2 Q.B. 379, 400; [1955] 1 All E.R. 708		138
Moyce *v.* Newington	4 Q.B.D. 32	*R.*	381
Mulcahy *v.* The Queen	L.R. 3 H.L. 306	*R.*	187
Mullett *v.* Mason	L.R. 1 C.P. 559		252
Munday *v.* Receiver of Metropolitan Police	65 T.L.R. 145; [1949] 1 All E.R. 337		555, 556
Musgrove *v.* Pandelis	[1919] 2 K.B. 43; 35 T.L.R. 299	*Appl.*	497, 504
Nanka-Bruce *v.* Commonwealth Trust	[1926] A.C. 77	*R.*	383
National Assistance Board *v.* Mitchell	[1956] 1 Q.B. 53; [1955] 3 All E.R. 291	Obiter dicta *D.*	506, 512, 513
National Benefit Insurance Co. Ltd., *In re*	[1931] 1 Ch. 46		277
New York Life Insurance Co. *v.* Public Trustee	[1924] 2 Ch. 101	*R.*	7, 17, 22
Noemijulia Steamship Co. Ltd. *v.* Minister of Food	[1951] 1 K.B. 223; 66 T.L.R. (Pt. 2) 342; [1950] 2 All E.R. 699		115
North Hallenbeagle Mining Co., *In re* (Knight's case)	L.R. 2 Ch. 321		167
North River Freighters Ltd. *v.* H.E. President of India	[1956] 1 Q.B. 333; [1956] 1 All E.R. 50	*Appl.*	111, 121, 122
Northwood *v.* London County Council	[1926] 2 K.B. 411; 42 T.L.R. 508		526
Old Gate Estates Ltd. *v.* Alexander	[1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822		42
Oliver American Trading Co. *v.* Government of U.S. of Mexico	5 Fed. 2d. 659	*R.*	463
Oscar Chess Ltd. *v.* Williams	Judgments of the Court of Appeal, 1956, No. 302	*R.*	259
Otto *v.* Bolton and Norris	[1936] 2 K.B. 46; 52 T.L.R. 438		53
Overseers of the Poor of Walsall *v.* London and North Western Railway Co.	4 App.Cas. 30	*R.*	588
Paris *v.* Stepney Borough Council	[1951] A.C. 367; [1951] 1 All E.R. 42		415
Parker *v.* South Eastern Railway Co.	2 C.P.D. 416	*Appl.*	410, 418, 421, 422, 425, 427, 428
Parlement Belge, The	5 P.D. 197	*R.*	460, 470, 473, 474
Pearson *v.* Rose & Young Ltd.	[1951] 1 K.B. 275; 66 T.L.R. (Pt. 2) 886; [1950] 2 All E.R. 1027	*R.*	384, 388, 392
Peek *v.* Derry	37 Ch.D. 541; 4 T.L.R. 84		252
Penn *v.* Jack	L.R. 2 Eq. 314		198
Perry *v.* Kendrick's Transport Co.	[1956] 1 W.L.R. 85; [1956] 1 All E.R. 154	*R.*	505
Perry *v.* Thomas Wrigley Ltd.	[1955] 1 W.L.R. 1164; [1955] 3 All E.R. 243n.		52

Phillips *v.* Barnett	[1922] 1 K.B. 222; 38 T.L.R. 39		325
Pitchers *v.* Surrey County Council	[1923] 2 K.B. 57; 39 T.L.R. 233	*R.*	556
Plata, S.S. (Owners) *v.* Ford & Co.	[1917] 2 K.B. 593		115
Plymouth Guardians *v.* Gibbs	[1903] 1 K.B. 177; 19 T.L.R. 11	*R.*	512
Pooley *v.* Bryning	[1940] 2 K.B. 26; 56 T.L.R. 594; [1940] 2 All E.R. 377		6
Porto Alexandre, The	[1920] P. 30	*R.*	459, 460
Powell *v.* Cleland	[1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672	*C.*	160, 169, 170
Preston-Jones *v.* Preston-Jones	[1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124	*Dist.*	247, 264
Reg. *v.* Aspinall	2 Q.B.D. 48	*R.*	179
Reg. *v.* Bernard	1 F. & F. 240; 8 St.Tr.N.S. 887	*R.*	188, 189
Reg. *v.* Brisac and Scott	4 East 164		177
Reg. *v.* Charlson	[1955] 1 W.L.R. 317; [1955] 1 All E.R. 859	*Dist.*	399, 403
Reg. *v.* Evening Standard Co. Ltd.	[1954] 1 Q.B. 578; [1954] 1 All E.R. 1026	*R.*	83
Reg. *v.* Finkelstein and Truscovitch	16 Cox C.C. 107	*F.*	175, 193
Reg. *v.* Flintshire County Council	[1956] 1 W.L.R. 1415; [1956] 3 All E.R. 535	*Rev.*	352
Reg. *v.* Gillyard	12 Q.B. 527	*R.*	586
Reg. *v.* Hampstead and St. Pancras Rent Tribunal, *Ex p.* Perseus Property Co. Ltd.	Judgments of the Court of Appeal, 1954, No. 191		104
Reg. *v.* Hepworth and Fearnley	[1955] 2 Q.B. 600; [1955] 2 All E.R. 918	*R.*	266
Reg. *v.* Hunt	1 Cox C.C. 177		556
Reg. *v.* Knock	14 Cox C.C. 1		557
Reg. *v.* Kohn	4 F. & F. 68	*C.*	175, 189, 190, 193
Reg. *v.* Langford	Car. & M. 602		555
Reg. *v.* Martin	[1956] 2 Q.B. 272; [1956] 2 All E.R. 86		177
Reg. *v.* National Insurance Commissioner, *Ex p.* Timmis	[1955] 1 Q.B. 139; [1954] 3 All E.R. 292	*C.*	576, 583, 585, 588
Reg. *v.* Newland	[1954] 1 Q.B. 158; [1953] 2 All E.R. 1067	*R.*	177
Reg. *v.* Page	[1954] 1 Q.B. 170; 37 Cr.App.R. 189; [1953] 2 All E.R. 1355	*R.*	188
Reg. *v.* Payne	[1896] 1 Q.B. 577; 12 T.L.R. 321		77
Reg. *v.* Sheerness U. D. C.	14 T.L.R. 533; 62 J.P. 563	*C.*	351, 360, 366, 368, 369
Reg. *v.* Smith	8 C. & P. 160	*D.*	548, 550, 551
Reg. *v.* St. Pancras Assessment Committee	2 Q.B.D. 581		42
Reg. *v.* Sylvester	31 L.J.M.C. 93	*R.*	360
Reg. *v.* Taylor	4 F. & F. 511		183
Reg. *v.* Tchorzewski	8 St.Tr.N.S. 1091	*R.*	189

Reg. *v.* The Cheltenham Commissioners	1 Q.B. 467	*R.*	586
Reg. *v.* Thornton	[1898] 1 Q.B. 334		356
Reg. *v.* Warburton	L.R. 1 C.C.R. 274	*C.*	175, 180, 191
Reg. *v.* West Riding of Yorkshire C. C.	[1896] 2 Q.B. 386; 12 T.L.R. 454	*R.*	359, 360, 366, 369
Rees *v.* Smith	2 Stark. 31	*R.*	204
Reohorn *v.* Barry Corporation	[1956] 1 W.L.R. 845; [1956] 2 All E.R. 742		167
Republic of Bolivia Exploration Syndicate Ltd., *In re*	[1914] 1 Ch. 139; 30 T.L.R. 146	*Appl.*	439, 464, 465, 470, 471, 474
Rex *v.* Atkinson	2 East P.C. 673	*R.*	382
Rex *v.* Bassey	47 T.L.R. 222		182
Rex *v.* Billingham	2 C. & P. 234		558
Rex *v.* Cashiobury Hundred Justices	3 Dow. & Ry. 35	*R.*	585
Rex *v.* Connor	8 Cr.App.R. 152		558
Rex *v.* Cooper, Rex *v.* Compton	63 T.L.R. 561; [1947] 2 All E.R. 701; 32 Cr.App. R. 102		177
Rex *v.* Dacey	55 T.L.R. 670; 27 Cr.App.R. 86; [1939] 2 All E.R. 641	Dicta *N.F.*	570–574
Rex *v.* Dolan	[1907] 2 I.R. 260	*Appl.*	74, 80
Rex *v.* "Evening Standard," "Manchester Guardian" and "Daily Express"	40 T.L.R. 833	*R.*	81
Rex *v.* Giles	1 Mood.C.C. 166	*R.*	184, 193
Rex *v.* Haddy	[1944] K.B. 442; 60 T.L.R. 253; [1944] 1 All E.R. 319		549
Rex *v.* I.C.R. Haulage Co. Ltd.	[1944] K.B. 551; 60 T.L.R. 399; [1944] 1 All E.R. 691	*R.*	172
Rex *v.* Income Tax Special Commissioners, *Ex p.* Elmhirst	[1936] 1 K.B. 487	*R.*	97
Rex *v.* Jukes	8 Term R. 542	*R.*	585
Rex *v.* London, etc., Rent Tribunal, *Ex p.* Honig	[1951] 1 K.B. 641; [1951] 1 T.L.R. 41; [1951] 1 All E.R. 195		105
Rex *v.* Moreley	2 Burr. 1041	*R.*	584
Rex *v.* Nat Bell Liquors Ltd.	[1922] 2 A.C. 128	*R.*	585, 589
Rex *v.* North Curry Inhabitants	4 B. & C. 953		127
Rex *v.* Northumberland Compensation Appeal Tribunal, *Ex p.* Shaw	[1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122	*R.*	588
Rex *v.* Parke	[1903] 2 K.B. 432; 19 T.L.R. 627	*R.*	81
Rex *v.* Plowright	3 Mod. 94	*R.*	584
Rex *v.* Smith	[1914] 2 I.R. 190		556
Rex *v.* Smith	1 Mod. 44	*R.*	584
Rex *v.* Stoddart	25 T.L.R. 612; 2 Cr.App.R. 217	*R.*	263
Rex *v.* Warnford	5 Dow. & Ry. 489	*Appl.*	576, 583
Rex *v.* West	[1948] 1 K.B. 709; 64 T.L.R. 241; [1948] 1 All E.R. 718; 32 Cr.App. R. 152		177
Rex *v.* Whitaker	[1914] 3 K.B. 1283; 30 T.L.R. 627		177

Richard Thomas & Baldwins Ltd. *v.* Cummings	[1955] A.C. 321; [1955] 1 All E.R. 285		33
Rickets *v.* Metropolitan Railway Co.	34 L.J.Q.B. 257		489
Rimmer *v.* Webster	[1902] 2 Ch. 163; 18 T.L.R. 548	*R.*	391
Roach *v.* Garvan (St. James's Evening Post)	2 Atk. 469	*Appl.*	74, 79, 80, 83
Robert Addie & Sons (Collieries) *v.* Dumbreck	[1929] A.C. 358		416
Roberts *v.* Coventry Corporation	63 T.L.R. 108; [1947] 1 All E.R. 308		526
Robinson *v.* Taylor	[1948] 1 K.B. 562; 64 T.L.R. 116; [1948] 1 All E.R. 291	*Q.*	39, 45, 46
Rogers *v.* Rice	[1892] 2 Ch. 170; 8 T.L.R. 511	*R.*	243
Routledge *v.* McKay	[1954] 1 W.L.R. 615; [1954] 1 All E.R. 855	*R.*	259
Royster *v.* Cavey	[1947] K.B. 204; 62 T.L.R. 709; [1946] 2 All E.R. 642	*R.*	145
Rutter *v.* Palmer	[1922] 2 K.B. 87	*R.*	425, 429
Rylands *v.* Fletcher	L.R. 3 H.L. 330	*R.*	505
Serjeant *v.* Nash, Field & Co.	[1903] 2 K.B. 304	*R.*	340, 343
Shanklin Pier Ltd. *v.* Detel Products Ltd.	[1951] 2 K.B. 854; [1951] 2 All E.R. 471	*Appl.*	230, 235
Sharp *v.* Wakefield	[1891] A.C. 173	*R.*	368, 369
Shaw *v.* Beck	8 Ex. 392	*R.*	215, 216
Shiels *v.* Great Northern Railway Co.	30 L.J.Q.B. 331	*Dist.*	2, 12, 15, 21
Simmons *v.* Bovis Ltd.	[1956] 1 W.L.R. 381; [1956] 1 All E.R. 736	*R.*	56
Sinclair *v.* Powell	[1922] 1 K.B. 393; 38 T.L.R. 239		326
Slater *v.* Clay Cross Co. Ltd.	[1956] 2 Q.B. 264; [1956] 3 W.L.R. 232		415
Slater *v.* Clay Cross Co. Ltd.	[1956] 2 Q.B. 264; [1956] 2 All E.R. 625	*R.*	56, 59, 60, 64, 71
Smith *v.* Baker	[1891] A.C. 325; 7 T.L.R. 679	*R.*	59
Smith *v.* Cammell Laird & Co.	[1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381	*R.*	142, 150
Smith *v.* London and St. Katharine Docks Co.	L.R. 3 C.P. 326		50
Smith *v.* Mawhood	14 M. & W. 452	*R.*	290
Smith *v.* Morris Motors Ltd. and Harris	[1950] 1 K.B. 194; 65 T.L.R. 642; [1949] 2 All E.R. 715		33
Sneath *v.* Commissioners of Inland Revenue	[1932] 2 K.B. 362	*R.*	97
South Shields Corporation *v.* Liverpool Corporation	[1943] K.B. 264; [1943] 1 All E.R. 338	*Appl.*	124, 130
St. James's Evening Post, Roach *v.* Garvan	2 Atk. 469	*Appl.*	74, 79, 80, 83

St. Thomas Rural District Council and Heavitree Urban District Council, *In re*	86 L.T. 153		543
Stoke-on-Trent Corporation *v.* Cheshire County Council	[1915] 3 K.B. 699		126
Stone *v.* Sheffield Corporation	4 P. & C.R. 426		302
Sulley *v.* Attorney-General	5 H. & N. 711	*R.*	21
Swan *v.* North British Australasian Co.	2 H. & C. 175	*R.*	389
Swedish Central Railway Co. *v.* Thompson	[1925] A.C. 495; 41 T.L.R. 385	*C.*	2, 13, 16, 17
Taylor *v.* Crowland Gas & Coke Co.	10 Ex. 293		276
Taylor *v.* Crowland Gas and Coke Co.	11 Ex. 1	*Dist.*	2, 8, 12, 13, 15, 20
Taylor (formerly Kraupl) *v.* National Assistance Board	[1956] P. 470; [1956] 2 All E.R. 455; [1957] P. 101; [1957] 1 All E.R. 183	*R.*	585
Taylor *v.* Parry	[1951] 2 K.B. 442; [1951] 1 T.L.R. 509; [1951] 1 All E.R. 355		510
Tharsis Sulphur and Copper Co. Ltd. *v.* Morel Bros. & Co.	[1891] 2 Q.B. 647; 7 T.L.R. 704		114
Thompson *v.* Palmer	49 C.L.R. 507, 547	*R.*	380
Thurtell *v.* Beaumont	1 Bing. 339	*D.*	247, 258
Townshend (Marquis), *In re*	22 T.L.R. 341	*Dist.*	74, 82
Travers *v.* Gloucester Corporation	[1947] K.B. 71; 62 T.L.R. 723; [1946] 2 All E.R. 506		53
Truman, Hanbury, Buxton & Co. Ltd.'s Application, *In re*	[1956] 1 Q.B. 261; [1955] 3 All E.R. 559	*Appl.*	332, 345, 346, 349
Tsang Chuen *v.* Li Po Kwai	[1932] A.C. 715	*R.*	391
Turberville *v.* Stamp	1 Ld.Raym. 264; 12 Mod. 152	*C.*	497, 503
Ulen & Co. *v.* Polish National Economic Bank	24 N.Y. 2d. 201	*E.*	439, 457, 461, 462, 467, 473
Union Corporation Ltd. *v.* Commissioners of Inland Revenue	[1952] 1 T.L.R. 651; [1952] 1 All E.R. 646	*C.*	2, 14, 16, 22
United States *v.* Deutsches Kalisyndikat Gesellschaft	31 Fed. 2d. 199	*R.*	462
United States of America and Republic of France *v.* Dollfus Mieg et Cie S.A. and Bank of England	[1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572	*R.*	469
Van Nievelt, Goudrian & Co. Stoomvaart Maatschappij *v.* C. A. Forslind & Son Ltd.	30 Com.Cas. 263; 41 T.L.R. 481; 21 Ll.L.Rep. 104	*R.*	116
Vaughton *v.* London and North Western Railway Co.	L.R. 9 Ex. 93	*R.*	261
Venables *v.* Department of Agriculture for Scotland	1932 S.C. 573	*F.*	485, 492, 494
Vita Food Products Inc. *v.* Unus Shipping Co.	[1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513	*Appl.*	268, 288, 290
Waddell *v.* Blockey	4 Q.B.D. 678		253
Walker's Case	3 Co.Rep. 22a		104
Weatherley *v.* Calder & Co.	61 L.T. 508	*Appl.*	2, 13, 17
Weiser *v.* Segar	[1904] W.N. 93		200
Wells *v.* Kingston-upon-Hull (Mayor, etc.)	L.R. 10 C.P. 402	*R.*	436
West *v.* Bristol Tramways Co.	[1908] 2 K.B. 14; 24 T.L.R. 478		498

Wetherell *v.* Jones	3 B. & Ad. 221	*Appl.*	268, 286, 291
William Thomas Shipping Co. Ltd., *In re*	[1930] 2 Ch. 368	*R.*	79
Williams *v.* Lord Bagot	4 Dow. & Ry. 315	*Appl.*	576, 583
Wilkie *v.* London Passenger Transport Board	63 T.L.R. 115; [1947] 1 All E.R. 258	*R.*	418, 427, 428
Wilkinson *v.* Rea Ltd.	[1941] 1 K.B. 688; [1941] 2 All E.R. 50	*Appl.*	135, 139, 141–145, 147, 153, 157
Wingrove *v.* Prestige & Co. Ltd.	[1954] 1 W.L.R. 524; [1954] 1 All E.R. 576	*R.*	158
Willmett *v.* Harmer	8 C. & P. 695		253
Wise *v.* Dunning	[1902] 1 K.B. 167; 18 T.L.R. 85	*R.*	562
Woolmington *v.* Director of Public Prosecutions	[1935] A.C. 462; 51 T.L.R. 446	*R.*	550
Wright *v.* Willcox	9 C.B. 650		198
Young *v.* Bristol Aeroplane Co. Ltd.	[1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293	*Appl.*	135, 147

STATUTES JUDICIALLY CONSIDERED

1361

Justices of the Peace Act, 1361 (34 *Edw.* 3, *c.* 1) - - - - - **C.C.A. 552**

1842–1935

Defence Acts - - - - - **C.A. 523**

1843

Theatres Act, 1843 (6 *&* 7 *Vict. c.* 68), *ss.* 5, 9 **C.A. 350**

1872

Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3 - **Divl.Ct. 506**

1883

Explosive Substances Act, 1883 (46 *&* 47 *Vict. c.* 3), *s.* 4 (1) - - - **C.C.A. 569**

Trial of Lunatics Act, 1883 (46 *&* 47 *Vict. c.* 38), *s.* 2 (1) - - **Devlin J. 399**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1) - - - **McNair J. 229**

—— —— *s.* 21 (1) - - - **C.A. 371**

1901

Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 79 - - - **C.A. 134**

1911

Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 29 (1), 75, 103 (2) - **Divl.Ct. 475**

1913

Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 6 (2) **Donovan J. and C.C.A. 174**

1919

Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *rules* (1), (2), (5), (6) **C.A. 485**

1925

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 74 (2) **Lord Goddard C.J. 431**

—— —— *s.* 84 (1) (12) - - **C.A. 330**

—— —— *ss.* 87, 146 - **Lord Goddard C.J. 238**

1930

Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 29 - - - **Divl.Ct. 84**

1932

Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *ss.* 44, 57 - **Devlin J. 267**

1933

Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 70 (2) *and proviso*, 90 (2) - - **Divl.Ct. 123**

Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 151 - **Lord Goddard C.J. 540**

—— —— *s.* 266 - **Lord Goddard C.J. 431**

1937

Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1) - - **Divl.Ct. 30**

—— —— *s.* 60 (*as amended by Factories Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12) **C.A. 134**

1938

Leasehold Property (Repairs) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 **Lord Goddard C.J. 238**

1939

Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1) (*d*), 27 **Lord Goddard C.J. 540**

1943

War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 8, 20 (1) - - - **C.A. 294**

1946

Finance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 12, *Sch. I* - - - - **C.A. 523**

Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1) **Divl.Ct. 103**

National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 36 (2) (3), 40 (1) - - - **C.A. 574**

1947

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24 (3) **Devlin J. 514**

—— —— *s.* 53 - - - - **C.A. 294**

1948

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23 - - - **C.C.A. 35**

National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44 (2) - - **Divl.Ct. 506**

1952

Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 35, 41 **Divl.Ct. 84**

Magistrates' Courts Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *ss.* 14 (3) (4), 26 (1), 105 (1) (*a*) - - - **C.A. 219**

1954

Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*) - - **C.A. 323**

—— —— *s.* 30 (1) (*g*), (2) - - **C.A. 159**

1955

Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 **Divl.Ct. 531**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 77 - - - - **C.A. 562**

Horizontal Milling Machine Regulations, 1928 (*S.R. & O.*, 1928, *No.* 548), *regs.* 3 (1), 6 - - - **Divl.Ct. 30**

National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5) - **C.A. 574**

National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (*S.I.* 1948, *No.* 1299), *reg.* 13 - - - **C.A. 574**

R.S.C., *Ord.* 12, *rr.* 4, 5 (1) (2) - **C.A. 1**

Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), "*Duties*," *reg.* 10 **C.A. 134**

Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3, 4 - - - **Divl.Ct. 23**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

DAVIES *v.* BRITISH GEON LTD.

C. A.

[1956 D. No. 214.]

1956
June 21, 22;
July 25.

Denning and Birkett L.JJ., and Harman J.

Practice and Procedure — Appearance — Company — Principal office in London — Factory in Wales — Writ against company issued in Cardiff registry—Appearance entered in London—Application to set aside appearance—Whether company can reside or carry on business in more than one place — " Resides " — " Carries on " business "—R.S.C., Ord. 12, *rr.* 4, 5 (1) (2).
Residence—Company.

A manufacturing company had its principal and registered office in London, where the directors had their offices and held their board meetings, where the company's policy was framed, contracts for the purchase of raw materials entered into and the prices of the products fixed. Its products were manufactured at its factory near Cardiff, which was controlled by an officer of the company responsible to the directors in London and who had nothing to do with sales or financial policy. Only lower paid staff were engaged by the personnel officer at the factory, higher paid staff being engaged by the secretary in London.

A labourer employed by the company at the factory contracted dermatitis and issued a writ against the company in the Cardiff

District Registry, stating, in compliance with R.S.C., Ord. 12, r. 4, that the company resided or carried on business within the district of the registry. Appearance was entered in London on behalf of the company, the memorandum stating that the company did not reside or carry on business within the district of the Cardiff registry. An application by the plaintiff for an order setting aside the appearance was refused by the master, whose refusal was affirmed by Pearson J. On appeal:—

Held (Harman J. dissenting), (1) that for the purposes of the Order and rules a company might "reside" in one place and "carry on business" in another.

(2) That for those purposes the defendant company "resided" in London, where the principal office was, but "carried on "business" both in London and at their factory, so that appearance ought to have been entered in the Cardiff registry.

Keynsham Blue Lias Lime Co. v. *Baker* (1863) 33 L.J.Ex. 41; 2 H. & C. 729; *Weatherley* v. *Calder & Co.* (1889) 61 L.T. 508 and *Dunlop Pneumatic Tyre Co. Ltd.* v. *Actien-Gesellschaft* (*etc.*) *vorm. Cudell & Co.* [1902] 1 K.B. 342 applied.

Taylor v. *Crowland Gas and Coke Co.* (1855) 11 Exch. 1; *Adams* v. *Great Western Railway Co.* (1861) 30 L.J.Ex. 124; *Shiels* v. *Great Northern Railway Co.* (1861) 30 L.J.Q.B. 331 and *Brown* v. *London and North Western Railway Co.* (1863) 32 L.J. Q.B. 318 distinguished.

Per Denning L.J. The railway cases, in which it was held that the companies "dwelt" and "carried on business" at the principal station only, are sui generis and cannot be taken to apply to ordinary manufacturing companies with a factory in one place and offices in the other. The income tax cases, such as *Swedish Central Railway Co.* v. *Thompson* [1925] A.C. 495; 41 T.L.R. 385 and *Union Corporation Ltd.* v. *Inland Revenue Commissioners* [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 are authorities on the words "ordinarily resident" and not at all on the words "carries "on business."

Per Harman J. The two expressions "resides" and "carries "on business" are synonymous in the case of a corporation. A company can have more than one residence or place of business, but in order that a company may carry on business at a place so as to make that place its residence at least some degree of control must be exercised there. The question where the company is controlled is purely one of fact, and on the facts here there can be only one answer—London.

Decision of Pearson J. [1956] 1 W.L.R. 769; [1956] 2 All E.R. 404 reversed.

APPEAL from Pearson J.

On February 2, 1956, the plaintiff, David William Davies, issued a writ againt his employers, British Geon Ltd., the defendant company, in the Cardiff District Registry, alleging that he had contracted dermatitis owing to their fault while he was working at their factory at Barry, which was within the district of the Cardiff District Registry. Service was accepted by the defendants' solicitors in Cardiff but on February 9 their London agents entered an appearance in the Central Office in London. The memorandum of appearance stated, in compliance with R.S.C., Ord. 12, r. 5 (2), that the defendant company neither resided nor carried on business within the Cardiff district. Application was made to Master Lawrence, on behalf of the plaintiff, for an order setting aside the appearance on the ground that the defendant company carried on business within the Cardiff district and that the appearance should have been entered in the Cardiff Registry in accordance with R.S.C., Ord. 12, r. 4.[1] Master Lawrence refused to make the order, whereupon the plaintiff appealed against his refusal to the judge in chambers. Pearson J. heard the appeal in open court.

It appeared from an affidavit submitted by the secretary of the defendant company that the company's registered office and its head office were situated in London, that the prices of its products were fixed in London, that the whole of the company's policy was framed in London, and that its final trading accounts were prepared in London. All board meetings of the directors and meetings of the company's shareholders were held in London. The purpose of the company was to manufacture raw materials and, in particular, polyvinylchloride, which was manufactured at the factory at Barry. There was a branch sales office in Manchester. The executive officers, namely, the chairman, acting managing director and sales director, all had their offices in London, as did the secretary of the company. The director in charge of research had his office at the factory. The general administration of the factory was under the control of an officer of the company at Barry, but that officer was subject to the control of the directors and officers in London, was not a director, and had nothing to do with either the sales or financial policy of the company. The contracts for the purchase of the two basic raw materials required for the manufacture of the company's products at Barry were entered into in London. The products of the factory were sold all over England and between 20 and 25 per cent. of them was exported. The responsibility for the sale of the products lay with the sales director in London. No employee or officer of the company at Barry had anything to do with the sale of the products. The secretary of the company in London was responsible for engaging staff whose basic wage was over £650 per annum, and the personnel officer at Barry was responsible for engaging staff whose basic wage was less than that figure.

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[1] R.S.C., Ord. 12, r. 4: "If any "defendant to a writ issued in a District Registry resides or carries on "business within the district, he shall "appear in the District Registry."

R. 5: "(1) If any defendant neither "resides nor carries on business in "the district, he may appear either "in the District Registry or at the "Central Office."

"(2) If an appearance is entered in "London by or on behalf of a defendant to a writ issued in a District "Registry, the memorandum of "appearance required by Rules 8 and "8A of this Order shall contain a "statement that such defendant "neither resides nor carries on business within the district of that "District Registry."

Pearson J. dismissed the appeal, but gave leave to appeal.

H. V. Lloyd-Jones Q.C. and *H. W. J. Ap Robert* for the plaintiff. This case involves the proper construction of Ord. 12, r. 4, which has not previously been the subject of a reported decision. The judge below, against his own inclinations, felt himself constrained by an old line of authorities to hold that a corporation "carried on business" at one place only, and that was at its principal place of business, in the present case in London. By rules 4 and 5, when a writ is issued in a district registry, a defendant must enter appearance there unless he can show that he neither "resides" nor "carries on business" in that district. The question is not one of venue, but of the conduct of interlocutory proceedings. For many reasons it is more convenient that in the present action such proceedings should be carried on locally in Cardiff.

The cases on which Pearson J. relied were concerned with the construction of certain language of the County Courts Act, 1846 (more properly, the "Act for the more easy recovery of small "debts, 1846"), dealing with venue, jurisdiction being given to the court of the district where the defendant "dwells or carries "on his business." First, in *Taylor* v. *Crowland Gas and Coke Co.*[2] it was held that a company should be considered as dwelling at the place where it carried on its business, and it would seem that "dwells" and "carries on business" were regarded as synonymous. There followed the railway cases, *Adams* v. *Great Western Railway Co.*,[3] *Shiels* v. *Great Northern Railway Co.*[4] and *Brown* v. *London and North Western Railway Co.*,[5] in which it was held that a railway company carried on business only at its principal station. In those cases the courts were attempting to adapt the language of the Act of 1846 in a sensible and

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[2] (1855) 11 Exch. 1.
[3] (1861) 30 L.J.Ex. 124.
[4] (1861) 30 L.J.Q.B. 331.
[5] (1863) 32 L.J.Q.B. 318.

C. A.
1956

DAVIES
v.
BRITISH
GEON LTD.

convenient way to meet a case not foreseen by the framers of the Act, that of a corporation whose activities were spread widely over the country; these cases have generally been regarded as being in a special category: see the observations of Lush L.J. in *Ex parte Breull*[6]; though the same principle was applied in *Aberystwith Promenade Pier Co.* v. *Cooper*,[7] it is submitted that that case was wrongly decided.

On the other hand, it was held in *Keynsham Blue Lias Lime Co.* v. *Baker*[8] that a company which had its head office in London and its factory in Somerset "dwelt" in Somerset, and *Mitchell* v. *Hender*[9] decided that an individual can carry on business in more than one place. [*Swedish Central Railway Co.* v. *Thompson*[10] and *Union Corporation Ltd.* v. *Inland Revenue Commissioners*[11] were also referred to.] In *Dunlop Pneumatic Tyre Co. Ltd.* v. *Actien-Gesellschaft (etc.) vorm. Cudell & Co.*[12] it was held that a foreign corporation which occupied a stall at an exhibition "carried on business" in England so as to be sued; and in *Weatherley* v. *Calder & Co.*[13] it was held that a Scottish firm with a branch office in Middlesbrough "carried on business" in Middlesbrough so as to be sued there.

The language of the present rules first appeared in the Supreme Court of Judicature (1873) Amendment Act, 1875, and was repeated in the Rules of 1883. A note to rules 4 and 5 in Chitty's Archbold, 14th ed. (1885), at p. 252, refers to the Act of 1846, and states that a corporation can carry on business at only one place, that is, where the principal business is transacted. The objects of the Act of 1846 and of the present rules are different, and it should not be presumed that the draftsman of the Act of 1875 had the railway cases in mind. There is no good ground for laying down such a distinction that a company can carry on business at only one place while a firm or individual, as in *Weatherley's* case,[13] can do so in more than one place. There is no such distinction in the language of the rules, which begin with the words "if any defendant . . ." The word "business" cannot be limited to mean merely the higher administrative activities; it must include also ordinary trading activities. The court is free to construe the rules in question unfettered by any previous authority. Justice and convenience require that the interlocutory proceedings should take place in the Cardiff district and not in London. [*Pooley* v. *Bryning*[14] and *In re Ebersley Hotel Co.*[15] were also referred to.]

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[6] (1880) 16 Ch.D. 484, 488.

[7] (1865) 35 L.J.Q.B. 44.

[8] (1863) 33 L.J.Ex. 41; 2 H. & C. 729.

[9] (1854) 23 L.J.Q.B. 273.

[10] [1925] A.C. 495; 41 T.L.R. 385.

[11] [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646.

[12] [1902] 1 K.B. 342.

[13] (1889) 61 L.T. 508.

Ap Robert following. The judgment below was based on the supposition that the earlier cases dealing with the Act of 1846 laid down a rule of law which later received legislative approval in the Rules of the Supreme Court. That rule of interpretation is much open to criticism; see, for example, the observations of Lord Radcliffe in *Galloway* v. *Galloway*[16]; it is mere presumption, and there was no reason why the draftsman of the rules should concern himself with decisions dealing with quite a different subject-matter.

Lionel Read for the defendant company. The submissions for the defendants are: (1) the burden of proof is on the plaintiff; (2) Ord. 12, rr. 4 and 5 (1), must be interpreted in accordance with the principles laid down in the cases dealing with sections 60 and 128 of the Act of 1846; (3) in the case of a corporation the expressions "resides" and "carries on business" are synonymous and not alternatives; (4) for the purposes of the rules a corporation carries on business at its principal place of business only; (5) a corporation has only one principal place of business, that is, where the general management is carried on. On the facts of this case the defendants' principal place of business is in London.

[Denning L.J. It would seem to be contrary to the ordinary use of language if the rules are taken to mean that an individual can carry on business at more than one place while a company cannot. A solicitor's clerk, when reading the rules, ought to be able to understand them in accordance with the ordinary use of language.]

All the cases (and they are not only railway cases) show that "resides" and "carries on business" are synonymous so far as corporations are concerned, and there can be no difficulty in finding out what is the principal place of business of a corporation. Moreover, the same words appear in Ord. 2, r. 1 (*a*), of the County Court Rules, and their meaning in that rule must be taken to have been settled by the decisions under the Act of 1846; it cannot surely be contended that the same words have different meanings in the two sets of rules.

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[14] [1940] 2 K.B. 26; 56 T.L.R. 594; [1940] 2 All E.R. 377.

[15] [1884] W.N. 252.

[16] [1956] A.C. 299, 320; [1955] 3 All E.R. 429.

In *Cesena Sulphur Co. Ltd.* v. *Nicholson*[17] a company was registered in England and held its meetings there, but all the practical business was carried on in Italy; it was held that for the purposes of income tax it was resident in England, the railway cases being cited and applied. It was cited with approval in *Swedish Central Railway Co.* v. *Thompson*,[18] which thus indirectly approves the railway cases and also indicates that for income tax purposes a company may have more than one place of residence. [*New York Life Insurance Co.* v. *Public Trustee*[19] and *Jones* v. *Scottish Accident Insurance Corporation*[20] were also referred to.]

Ever since *Taylor* v. *Crowland Gas and Coke Co.*[21] the principle has been accepted that a corporation resides and carries on business in one and the same place; no distinction has been drawn between "dwells" or "resides" on the one hand, and "carries "on business" on the other. The *Keynsham* case[22] is distinguishable from the main line of authority, as according to the judgment of Bramwell B., as reported in Hurlstone and Coltman,[22] the London office was merely a place where the directors met for their own convenience.

Lloyd-Jones Q.C. in reply. In the *Keynsham* case[22] Pollock C.B. said that the railway cases were not applicable to a company having an office in London and a factory elsewhere; see also the observations of Pollock B. in *Jones* v. *Scottish Accident Insurance Corporation*.[23] In *New York Life Insurance Co.* v. *Public Trustee*[24] Warrington and Atkin L.JJ. expressed the view that for purposes of suit a corporation resides in as many places as it carries on business; it follows that for such purposes it can carry on business in more places than one. Such a case affords much better guidance than the old railway cases to the construction of the rules.

Cur. adv. vult.

July 25. The following judgments were read.

DENNING L.J. I will ask Birkett L.J. to deliver the first judgment.

BIRKETT L.J. This is an appeal from a judgment of Pearson J. given on May 7 this year. It concerns the meaning to be given to the words in Ord. 12, rr. 4 and 5, of the Rules of the Supreme Court.

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[17] (1876) 1 Ex.D. 428.

[18] [1925] A.C. 495.

[19] [1924] 2 Ch. 101.

[20] (1886) 17 Q.B.D. 421.

[21] 11 Exch. 1.

[22] 2 H. & C. 729, 733.

[23] 17 Q.B.D. 421.

[24] [1924] Ch. 101, 115, 120.

[His Lordship read rules 4 and 5 (1) and continued:] In the present case the writ was issued in the Cardiff District Registry, and the defendants have their factory within the district, and if it should be held that they carry on business within the district, they ought to appear in the district registry in conformity with rule 4: but if it should be held that they do not carry on business within the district then the appearance can be either in the Cardiff District Registry or at the Central Office.

It is not contended that the defendants "reside" in the Cardiff district, in view of the decided cases, but merely that they carry on business there.

The words "resides or carries on business" first appear in the Rules of 1875 and are repeated in the Rules of 1883. Some of the cases which are relevant to this appeal are decisions on the words appearing in the County Courts Act, 1846, ss. 128 and 129. Such a case was the important case of *Taylor* v. *Crowland Gas and Coke Co.*[1] Section 128 provided that "all actions and "proceedings which before the passing of this Act might have "been brought in any of Her Majesty's Superior Courts of "Record . . . where the cause of action did not arise wholly "or in some material point within the jurisdiction of the court "within which the defendant dwells or carries on his business . . . "may be brought and determined in any such superior court "at the election of the party suing or proceeding. . . ."

Section 129 deals with the question of costs when any party has acted in disregard of the provisions of section 128.

The precise point raised in this appeal does not appear to have been raised in this form during the lifetime of the Order and rules in question; and from the practical point of view it does not appear to matter much, at first sight, whether the appeal is allowed or dismissed; for any inconvenience which may arise from any construction of the rules can be quickly remedied by an application under Ord. 35, r. 16. But it has been thought right to raise the question of the meaning of the words in the Order and rules because of the special facts of this case, and Pearson J. gave the matter the fullest consideration and delivered a most helpful and painstaking judgment, in which he reviewed the authorities at some length, and stated his conclusions most clearly and firmly.

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[1] (1855) 11 Exch. 1.

The evidence before the judge showed that the defendant company manufactured certain products, including a powder used for making plastic goods. This manufacture was carried on at Sully in the County of Glamorgan within the district of the Cardiff Registry of the High Court of Justice. About 400 or 500 people were employed at the factory, and it was the only factory of the defendant company. The registered office of the company is in Piccadilly, London. The board meetings of the company are held and the policy of the company is decided at St. James's Square, London. The secretary of the company in his affidavit said that the control of the company was in London, contracts were entered into there, prices fixed there, and the sale of the company's products was solely in the hands of the sales director whose office was in London. Mr. Davies, the plaintiff in the action, was employed by the defendants at the factory in Glamorgan, and he sued his employers for damages on account of injuries he had suffered through contracting dermatitis at his work, for which he contended the defendants were liable. The writ was in the Cardiff District Registry, and it was contended for the plaintiff that as the defendant company "carried on business" within the Cardiff District Registry at the factory at Sully, some seven miles from Cardiff, they ought to have entered an appearance in the Cardiff District Registry, in accordance with Ord. 12, r. 4. But the appearance was in fact entered in London, and it follows that as matters now stand, and if nothing more is done, all the interlocutory work will be done in London. The plaintiff's solicitors, who reside and carry on business in Wales, have not invoked the aid of Ord. 35, r. 16, but have chosen to make the matter a point of principle by moving to strike out the appearance of the defendants as they are enjoined in the White Book to do if the appearance is erroneous, and to compel them to enter appearance in Cardiff. The defendant company entered the appearance in London because they contended that they did not reside or carry on business in Glamorgan within the meaning of the Order and rules with which we are now concerned, but resided and carried on business in London only, and were within the protection of Ord. 12, r. 5 (1). Giving the ordinary meaning to ordinary English words, nobody could doubt, I think, that the defendant company carried on business at the factory in Glamorgan, and also at the head offices in London: but, unfortunately, the question is not so simple as that because of the decided cases of the last 100 years.

Pearson J. made it quite plain that, had he been free to do so, he would have given the words this plain ordinary meaning. In a passage which appears to contain the judge's considered opinion when he was rereading the transcript of his judgment as delivered in court, he said[2]: "On merely looking at the words "of the rules without guidance from authority, I should have "been inclined to say (1) that different meanings should be "given to the expression 'resides' and the expression 'carries "'on business'; (2) that, as a defendant might be either a "natural person or a corporation, the two expressions probably "have their different meanings both in relation to a natural "person and in relation to a corporation; (3) that a corporation, "no less than a natural person, may be carrying on business in "several places; and (4) that manufacturing in a large factory "constitutes carrying on business. . . . Moreover[3] a reasonable "and convenient effect could be given to the rules in question if "the expression 'carries on business' were understood according "to its ordinary meaning, so that, if a company, though its "principal office was elsewhere, had an establishment and "carried on one of its principal activities in the area of a district "registry, it could be sued in that district registry and would "then have to enter its appearance there and the interlocutory "proceedings would be conducted there, except that in a case "of hardship an application could be made under Ord. 35, r. 16, "to have the case transferred to the Central Office. In industrial "accident cases I think there would normally be a saving of "expense if the interlocutory proceedings were conducted in "the district registry of the area in which the accident occurred."

If I may respectfully say so, that passage is filled with excellent common sense, and it is necessary to look at the authorities to see whether they do, indeed, compel the judge to decide the case as he did, contrary to his desire, and the common sense of his interpretation. There were three passages in the judgment which seem to me to contain the essence of the matter. He said[4]: "Therefore, I think it must be taken that for many "purposes it is possible for a corporation to be carrying on "business in more places than one, and even to be residing in "more places than one; but here we have these rules, enacted "initially in 1875 and repeated in 1883; they have remained in "force ever since, and in addition great weight should be given to "the view taken in Chitty's Archbold in 1885. It is reasonable

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[2] [1956] 1 W.L.R. 769, 771; [1956] 2 All E.R. 416.

[3] [1956] 1 W.L.R. 769, 778.

[4] [1956] 2 All E.R. 404, 414.

"also to suppose that the draftsman of the 1875 rules must "have had in mind the previous decisions, and the matters "are sufficiently in pari materia. Therefore I hold that not-"withstanding the recent authorities, it is right to say that for "the purposes of these rules a corporation is deemed to have "only one place of business."

The second passage is [5]: "Therefore, I think that I am bound "to hold, in spite of what would naturally have been thought on "merely reading the words, that there is no distinction between "'residing' and 'carrying on business' when dealing with a "corporation, and that a corporation has only one place of "business, and that is its principal place of business."

The third passage reads as follows [6]: "As I have said, if "there had been no previous authority I should have arrived "at a different conclusion here. I should have thought that the "right general principle is that you give the ordinary meaning to "the words 'carries on business', and if in an ordinary reason-"able sense you find a company is established and is carrying on "one of its principal activities at that establishment within the "area of the District Registry, it should have been said at any "rate that its business was carried on partly within that District "Registry. If that created hardship on the defendant in some "case, as it might, then an application can be made under R.S.C., "Ord. 35, r. 16, to have it transferred to the Central Office. In "spite of those feelings, however, I feel overborne by the autho-"rity of the decided cases, and that old and high authority, "namely, Chitty's Archbold, which is referred to in the Annual "Practice. For that reason this appeal fails."

The situation in this court, therefore, would seem to be whether it is possible to give that "reasonable and convenient" effect to the Order and the rules in question which Pearson J. desired and stated, or whether the decided cases preclude us from doing so, as Pearson J. felt that they precluded him.

To say that the defendant company does not carry on business at Sully in Glamorgan is to defy common sense; to say that a company cannot carry on business both at Glamorgan and London is equally repugnant to common sense; the simple question is: do the authorities compel this court to come to the same conclusion as Pearson J.?

It is quite clear that Pearson J. was greatly influenced by the statement in Chitty's Archbold of 1885: "A corporation can only "carry on business in one place and that place is the place

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[5] [1956] 2 All E.R. 404, 414.

[6] Ibid. 416.

"where its principal business is transacted." After citing the facts of the present case, Pearson J. also said [7]: ". . . having "regard to the railway company cases and the case of *Keynsham* "*Blue Lias Lime Co.* v. *Baker*,[8] I think the right finding is that "the company carries on business at its head office, which is "in Piccadilly, London." In *Adams* v. *Great Western Railway Co.*,[9] which was a decision on the words of the County Courts Act, 1846, it was held that the railway company "dwells" at Paddington only because the general control and management was centred there. This decision was followed in many other cases such as *Shiels* v. *Great Northern Railway Co.*[10] and *Brown* v. *London and North Western Railway Co.*[11] These decisions, it would appear, were governed by considerations of convenience, for nobody could doubt that in the ordinary use of language the Great Western Railway, for example, carried on business at Birmingham as well as Paddington. The railway cases have always been recognized as exceptional cases, and in *Keynsham Blue Lias Lime Co.* v. *Baker*,[12] where the head office of the company had always been in London, although their factory was within the Bristol area, when the liquidator sued for a small debt in London, it was held that he should have brought it in the Bristol or Somerset county court. Pollock C.B. said [13]: "But in my judgment that furnishes no rule whatever for the "plain case of a company having a place of business where they "manufacture an article and there sell and deliver it to persons "residing in the neighbourhood, as this company did. It is said "that a person who has bought of them a few shillings worth of "goods may be sued in the courts of Westminster Hall because "the company have an office in London where the directors "meet for the purpose of conducting the affairs of the company. "It seems to me that affords no ground whatever for holding "that there is a concurrent jurisdiction, when the goods are "manufactured and sold at Keynsham to a tradesman residing "at Bristol."

Bramwell B. said he was of the same opinion [14]: "The "plaintiffs are a corporation, and the case of *Taylor* v. *Crowland* "*Gas and Coke Co.*[15] is an authority that a corporation dwells "at the place where its business is carried on."

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[7] [1956] 1 W.L.R. 769, 779.
[8] (1863) 33 L.J.Ex. 41; 2 H. & C. 729.
[9] (1861) 30 L.J.Ex. 124.
[10] (1861) 30 L.J.Q.B. 331.
[11] (1863) 32 L.J.Q.B. 318.
[12] 33 L.J.Ex. 41; 2 H. & C. 729.
[13] 2 H. & C. 729, 733.
[14] Ibid.
[15] 11 Exch. 1.

Channell B. said[16]: "I think that the decisions as to railway companies are not applicable, for the reason given by the "Lord Chief Baron."

Pigott B. said he was of the same opinion, and added[17]: "But this company carried on their business, in every sense, at "Keynsham, and not at their office in London." But the directors controlled the business, and that case seems to support in some measure at least the contention of the plaintiff in the present case.

It would appear further that the statement in Chitty's Archbold, which so influenced the judge, was based on the decisions in the railway cases, and it can be said with equal force in this case, as in the *Keynsham* case, that the decisions are inapplicable. In *Taylor* v. *Crowland Gas and Coke Co.*[18] the court was considering the words of section 128 of the Act of 1846, and decided on the facts of that case that the company dwelt at the place where it carried on its business. I say "decided on the "facts" for this reason, that the court was not then considering the case of a company with an office in one place and a factory in another, but a case where the company had its offices and works in the same place and all the business was done in the one place. This early case has greatly influenced the decision in subsequent cases, but its special facts ought to be remembered. *Mitchell* v. *Hender*[19] decides that an individual can carry on business in more than one place, again a decision under section 128 of the Act of 1846; *Weatherley* v. *Calder & Co.*[20] decides that a firm in Scotland carrying on business there can at the same time carry on business in England at a branch establishment.

For certain purposes a corporation may reside in different countries, as in the case of *Dunlop Pneumatic Tyre Co. Ltd.* v. *Actien-Gesellschaft (etc.) vorm. Cudell & Co.*,[21] and in the cases relating to income tax it is clearly possible for a corporation to have two places of business: see *Swedish Central Railway Co. Ltd.* v. *Thompson.*[22]

From all this it would appear that a corporation for many purposes can carry on business in more places than one, and can reside in more places than one.

The questions in the present appeal would appear to be: (1) Is the view of Pearson J. right that for the purposes of

[16] 2 H. & C. 729, 734.

[17] Ibid.

[18] 11 Exch. 1.

[19] (1854) 23 L.J.Q.B. 273.

[20] (1889) 61 L.T. 508.

[21] [1902] 1 K.B. 342.

[22] [1925] A.C. 495; 41 T.L.R. 385.

Ord. 12, rr. 4 and 5, a corporation is deemed to have only one place of business? (2) Is the view of Pearson J. right that the one place of business is the principal place of business where the central control and management actually abides? (3) Is the view of Pearson J. right that for the purposes of Ord. 12, rr. 4 and 5, the defendants do not carry on business at their factory in the Cardiff district?

In *De Beers Consolidated Mines Ltd.* v. *Howe* Lord Loreburn L.C. said[23]: "Now, it is easy to ascertain where an "individual resides, but when the inquiry relates to a company, "which in a natural sense does not reside anywhere, some "artificial test must be applied." And the artificial test applied in that case, as it had been applied in many income tax cases where the question was whether the company was resident in the United Kingdom, was to determine where the real business was carried on, and that was where the central control and management actually abides.

This test was followed in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[24] where Evershed M.R., giving the judgment of the court, said, in reviewing the authorities so far as the law relating to income tax was concerned: "Where, on "these facts, is Union Corporation Ltd. 'ordinarily resident'? "Or, since it is conceded on both sides that in the present case "the adverb is without significance, where is it 'resident'?" And in the full judgment he reviewed that question of residence and I need make no further citations from the case. But these were cases dealing with income tax, and the question of residence for that purpose, but must it be said that if the defendant company resided in London, because of the authority of this and other cases, that it could not also carry on business at Sully in Glamorganshire, so that it could be sued in the Cardiff District Registry, and ought to enter an appearance there?

I do not think that the question which arises in the present case has ever been before the courts in this form, and for the purposes of the present Order and rules I am of the opinion that the defendant company resided and carried on business in London within the meaning of the authorities, but that circumstances did not preclude it from carrying on business also at Sully in the County of Glamorgan; and I know of no authority which compels the court to say that it does not carry on business, for the purpose of these rules, in the district of the Cardiff District Registry.

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[23] [1906] A.C. 455, 458; 22 T.L.R. 756.

[24] [1952] 1 T.L.R. 651, 660; [1952] 1 All E.R. 646.

So far from this decision upsetting established practice, I believe that, as Pearson J. said, reason and convenience combine to make the decision in conformity with modern conditions and practice, and would result in economies in procedure.

I would therefore allow the appeal.

DENNING L.J. I agree with the judgment which Birkett L.J. has just delivered. Reason and convenience favour our decision. The solicitors on each side are in Cardiff and counsel on both sides belong to the local Bar. It is obviously cheaper for the interlocutory proceedings to be conducted in Cardiff rather than in London.

Although the judge expressed his personal view in favour of the plaintiffs, nevertheless he felt compelled by the authorities to decide that, for the purposes of this Order, a corporation carries on business at only one place, that is, at its principal place of business, and that the defendant company therefore only carried on business in London. I can quite understand that the judge felt it right, sitting at first instance, to bow to the authorities; but I do not think we should. I will go through the authorities to show how they appear to me.

The judge quotes *Taylor* v. *Crowland Gas and Coke Co.*[25] for the proposition (though he says it is artificial) that in relation to a corporation the expression " dwells " and the expression " carries " on business " have only one meaning and not two separate meanings. The facts in that case were that the Crowland Gas Co. had its gas works in Crowland, and its offices there, and its directors met there. It was argued that it did not " dwell " there, but at the place or places where the shareholders lived. The court retorted, quite naturally, that " the company dwells " where it carries on business." That statement was very appropriate to that case, where every part of the business was carried on in Crowland. It is quite inappropriate to a case where the company carries on business in two places, as, for instance, where the factory is in one place and the offices in another. The court had no such case in mind and their observations cannot be taken to extend to it.

Now we come to the railway cases, *Adams* v. *Great Western Railway Co.*,[26] *Shiels* v. *Great Northern Railway Co.*,[27] *Brown*

[25] 11 Exch. 1.

[26] 30 L.J.Ex. 124.

[27] 30 L.J.Q.B. 331.

v. *London and North Western Railway Co.*[28] and *Le Tailleur* v. *South Eastern Railway Co.*[29] It was there held that a railway company " dwells " and " carries on its business " only at the principal station where the general superintendence of the whole concern is centred; and not at any station, however large, where the local management is conducted. In each of those cases the decision was put by the judges on the ground of convenience. They recognized that, according to the ordinary use of language, a railway company carries on business at every station on the line, however small; but inasmuch as that would have meant that it could be sued in every county court throughout its system, the judges went to the other extreme and held that a railway carried on its business at the principal station only. Those cases have frequently been said to be sui generis: see, for instance, by Pollock C.B. in *Keynsham Blue Lias Lime Co.* v. *Baker*,[30] and by Lush L.J. in *Ex parte Breull.*[31] They cannot, therefore, be taken to apply to ordinary manufacturing companies which have a factory in one place and an office in another. Indeed, the courts have refused to apply the railway cases to a manufacturing company. A case in point is *Keynsham Blue Lias Lime Co.* v. *Baker.*[32] The Keynsham company had its offices in London where the directors met and controlled the company's affairs; but it had its factory at Keynsham in Somersetshire where it manufactured and sold and delivered its products. It supplied a small quantity of goods to a trader down there and the court held that the company " dwelt " in Somerset and not in London.

There is, however, one case which appears at first sight to extend the railway cases to other companies. It is *Aberystwith Promenade Pier Co.* v. *Cooper.*[33] The company had a pier and toll-keeper at Aberystwith but its only office was at Westminster, where the substantial business of the company and all negotiations were done. It had no office at Aberystwith. The court held that the company " dwelt " at Westminster and not at Aberystwith. That decision may well be a correct decision on the word " dwells " but it is no authority at all on the meaning of " carries on business."

The income tax cases, too, such as *Swedish Central Railway Co.* v. *Thompson*[34] and the *Union Corporation* case[35] are authorities

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[28] 32 L.J.Q.B. 318.
[29] (1877) 3 C.P.D. 18.
[30] 2 H. & C. 729, 733.
[31] (1880) 16 Ch.D. 484, 488.
[32] 33 L.J.Ex. 41; 2 H. & C. 729.
[33] (1865) 35 L.J.Q.B. 44.
[34] [1925] A.C. 495.
[35] [1952] 1 T.L.R. 651.

C. A.

1956

DAVIES
v.
BRITISH
GEON LTD.

Denning L.J.

on the words "ordinarily resident" and not at all on the words "carries on business."

When we come to the words "carries on business" we find many cases to show that a firm or company may "dwell" or "reside" in one place and "carry on business" in another. A good instance is *Weatherley* v. *Calder & Co.*,[36] where a Scottish firm had its head office in Glasgow and a branch office in Middlesbrough. It was held that it "carried on business" in Middlesbrough so as to be sued there. So, also, in *Dunlop Pneumatic Tyre Co.* v. *Cudell & Co.*,[37] a foreign corporation hired a stand at the cycle show at the Crystal Palace for nine days to exhibit their articles. It was held that during the show the foreign corporation was "carrying on business" in England so as to be sued here. Such authorities amply warrant the dictum of Atkin L.J. in *New York Life Association* v. *Public Trustee* in 1924, where he said[38]: "the true view is that the corporation resides "for the purposes of suit in as many places as it carries on "business."

In the present case Pearson J. felt overborne by the statement in Chitty's Archbold, 14th ed. (1885), at p. 252: "A corporation "can only 'carry on business' in one place, and that place is "the place where its principal business is transacted." That statement is based on the railway cases. None of them is binding on this court. I think those cases turn on special grounds of convenience in regard to county court proceedings and the rules as to costs then in force. I doubt whether those grounds exist today. In any case the reasoning in them cannot properly be extended to other cases. It seems to me plain that a company, like an individual or a firm, can carry on business in several places.

It was said that the county court practice is still based on the old railway cases. I do not accept that view. I can remember many cases in the days when I went to the county courts in which a railway company was sued in the county court in the country and not in the London court. The action is normally brought where the cause of action arose, and no question arises as to where the company "carries on business." I do not suppose that the question has arisen for the last 80 years. At any rate there is no decided case about it. If the present case, for instance, were brought in the county court it would certainly be in the Cardiff county court, where the cause of action arose, and not in London, and all the interlocutory proceedings would be in Cardiff. I do not think that the view held by Birkett L.J. and myself will interfere in the slightest with the existing county court practice.

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[36] 61 L.T. 508.

[37] [1902] 1 K.B. 342.

[38] [1924] 2 Ch. 101, 120.

Upon the facts of this case I think that the defendant company resided in London but carried on business both in London and at Sully, near Cardiff, in the County of Glamorgan. The defendants ought, therefore, to have entered their appearance in the district registry. I would be in favour of allowing the appeal accordingly.

HARMAN J. This is a storm in a teacup, and to my mind, having regard to the fact that the plaintiff is in receipt of legal aid, a great waste of public money. The plaintiff, whilst in the defendants' employment at their factory at Sully, suffered an injury to his health for which he conceived that the defendants were responsible. Accordingly, having obtained a legal aid certificate, he issued, as he was well entitled to do, out of the district registry at Cardiff, a writ claiming damages in the Queen's Bench Division of the High Court, and on the same date delivered his statement of claim. Now it appears that both the plaintiff and the defendants employ solicitors having their offices in Wales and one would have thought that, as a matter of convenience, the defendants would enter their appearance in the district registry, as they had an option to do under Ord. 12, r. 5. They did not take this course, but entered appearance in London. Even so, if both solicitors had wished to get on with the action, and it had been more convenient to carry it on in the district registry, there would have been no difficulty by agreement in having the proceedings transferred thither.

The plaintiff's solicitors, however, did not take this course, but apparently after delivery of the defence, instead of letting the action take its course, in which event it would by now have been ripe for trial, chose to move to set aside the entry of appearance on the ground that the defendants reside or carry on business within the area of the district registry and were bound to appear there under Ord. 12, r. 4. The plaintiff is personally not concerned with this; his interest is to get his action tried, and it could be just as well tried and a great deal more cheaply by issuing a summons for directions in London than by employing leading counsel before the Court of Appeal on what is a mere technicality on which, if it succeeds, the only difference will be that the summons for directions will issue in the Cardiff District Registry and the trial will be delayed perhaps six months. No question of venue arises: it is purely a question where the summons for directions shall be heard.

The point, though trivial, is not easy of solution, but for myself I cannot doubt that the judge was right in holding himself bound to the conclusion that the defendant company does not reside nor carry on business within the area of the district registry. Moreover, as will appear, I think this court is no less bound; but even if it were not, this seems to me eminently an instance to which the principle of stare decisis ought to be applied; for if we allow this appeal, we shall be upsetting a long settled line of authorities, and, moreover, affecting the jurisdiction of the county courts. Under Ord. 2, r. 1 (*a*), of the County Court Rules, 1936, regulating the place "where proceedings may "be commenced," are found these words: "in the court for "the district in which the defendant . . . resides or carries on "business." Thus the same words are used as appear in Rules of the Supreme Court, Ord. 12, r. 4, and to my mind the same meaning ought to be given to them. It seems clear on the line of authorities cited by the judge below that in the county courts it is settled that for the purposes of this rule a company carries on business where its control abides. It would be lamentable if in the High Court under Ord. 12 the same words should bear a different meaning.

I agree that if this matter were res integra we might conclude that a company carries on business wherever it has an office or can be found trading. Indeed, for purposes of service in this country of processes upon foreign corporations some such rule does prevail; for instance, see *Compagnie Générale Transatlantique* v. *Thomas Law & Co.*[39] But that is an entirely different question from the question of where a company resides or carries on business for other purposes. See, as to this, the *De Beers* case in the Court of Appeal[40]; and in the same case in the House of Lords[41] in the argument and in the speech of Lord Loreburn L.C. Accordingly, if the defendants were a foreign corporation having a factory at Barry, as they have, it may well be that a writ could be served on the company there. But this is not a foreign corporation; it is a company limited under the Companies Acts and can only be served at its registered office (Companies Act, 1948, s. 437). Service, therefore, on this company at Barry would be bad. The defendants have their registered office in London and must be served there unless their solicitors are willing to accept service. It is said, nevertheless, that having been served in London, appearance must be entered at Cardiff because the company carries on business there. In my judgment this is wrong. So long ago as 1876 Huddleston B., giving judgment in the case of *Cesena Sulphur Co. Ltd.* v. *Nicholson*,[42] laid down the law which has ever since been followed. The company there had its factory in Italy, where the entirety of its manufacture was carried on, and Huddleston B. said this: "I "own that I had every inclination to yield to the able arguments "which were employed by the counsel for the appellants in each "case, and it is with the greatest reluctance that I have come "to a contrary conclusion. The whole question turns on the "interpretation of 'residence' as applicable to a company. The "tax is only imposed upon a 'person residing within the United "'Kingdom,' and a corporation for the purpose of paying income "tax is a 'person.' The use of the word 'residence' is founded "upon the habits of a natural man, and is therefore inapplicable "to the artificial and legal person whom we call a corporation. "But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial "person, and one formed on the analogy of natural persons. "There is not much difficulty in defining the residence of an "individual; it is where he sleeps and lives. I adopt Mr. "Matthews' suggestion, that 16 and 17 Victoria, chapter 34, "when it speaks of 'residing' does not mean an artificial "residence. It means an actual residence. Mr. Matthews argues, "therefore, that when you deal with a trading corporation it "means the place not where the form or shadow of business but "where the real trade and business is carried on, and that "definition seems to be almost conceded by all the counsel. "There is a German expression applicable to it which is well "known to foreign jurists—der Mittelpunkt der Geschäfte; and "the French term is 'le centre de l'entreprise,' the central point "of the business. All the cases cited support that view. In "*Keynsham Blue Lias Co.* v. *Baker*,[43] the court held that "Keynsham was the place of business, because the substantial "business was carried on there, though the registered office was "in London. In *Taylor* v. *Crowland Gas Co.*[44] the learned judges "thought that a company dwells where it carries on its business. "In *Adams* v. *Great Western Railway Co.*[45] it was held that "the place where that company carried on its business was

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[39] [1899] A.C. 431; 15 T.L.R. 424.

[40] [1905] 2 Q.B. 612, 637, 643.

[41] [1906] A.C. 455, 456, 459.

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[42] (1876) 1 Ex.D. 428, 451.

[43] 33 L.J.Ex. 41; 2 H. & C. 729.

[44] 11 Exch. 1.

[45] 30 L.J.Ex. 124.

"Paddington. So in *Brown* v. *London and North Western Rail-* "*way Co.*[46] it was held that the place where that company "carried on its business was at Euston, and not at Chester as "had been contended. The same rule had been applied in *Shiels* "v. *Great Northern Railway Co.*[47] Then there is a very strong "case, *Aberystwith Promenade Pier Co.* v. *Cooper*,[48] where it "was held that the place of business was in London, although "the pier was built in Wales and the tolls were taken there. "The decision in *Sulley* v. *Attorney-General*[49] was to the same "effect. The case of *Kilkenny and Great Southern and Western* "*Railway Co.* v. *Feilden*,[50] which was cited for the appellants, "is, I am satisfied, distinguishable. In the last case in this "court, *Attorney-General* v. *Alexander*,[51] there was no charter "of incorporation in England, and two at least of the learned "judges—the Lord Chief Baron and my Brother Amphlett—held "that Constantinople, where the corporation was incorporated, "was the seat of business, the place where the business was "carried on."

This has been followed ever since and was expressly confirmed in the House of Lords by Lord Loreburn L.C. in the *De Beers* case,[52] already mentioned, in which he said this: "The decision of Kelly C.B. and Huddleston B. in . . . *Cesena* "*Sulphur Co. Ltd.* v. *Nicholson*[53] now 30 years ago, involved the "principle that a company resides for purposes of income tax "where its real business is carried on. Those decisions have been "acted upon ever since. I regard that as the true rule, and the "real business is carried on where the central management and "control actually abides." In my judgment this principle cannot be confined to income tax cases; indeed, it is largely based on the old cases under the County Courts Acts as the judge below showed. It is a principle too old now to be shaken. It seems to me to be obvious that a company can only reside where it carries on business and I think the converse must be true. In other words, the two expressions "resides" and "carries on business," though they are alternatives in the case of an individual, are synonyms in the case of a corporation which can have no residence in the proper case. It is also true that a company can have more than one residence or place of business,

[46] 32 L.J.Q.B. 318.
[47] 30 L.J.Q.B. 331.
[48] 35 L.J.Q.B. 44.
[49] (1860) 5 H. & N. 711.
[50] (1851) 6 Exch. 81.
[51] (1874) L.R. 10 Exch. 20.
[52] [1906] A.C. 455, 458.
[53] 1 Ex.D. 428.

as the *New York Insurance Co.* case[54] cited by the judge shows, but in order that a company may carry on business at a place so as to make that place its residence at least some degree of control must be exercised there. This is pointed out by the Court of Appeal in the latest decision on this subject, namely, *Union Corporation* v. *Commissioners of Inland Revenue*[55] in the headnote, and in the judgment of the Master of the Rolls. It was suggested that the *Keynsham* case[56] showed that the Court of Appeal took the view that a company resided where its manufacturing business was carried on, and so it was decided; but this was to the exclusion of the place of its registered office, and the ratio decidendi of that case was the now discarded theory that a company can have only one place of business or residence. The question where the company is controlled is purely one of fact, and on the facts here there can be only one answer, and it is London. Nothing is decided at Barry beyond the engagement or dismissal of workmen, although no doubt the whole of the manufacturing of the company's products is carried out there. If the plaintiff be right, the company must also carry on business at its branch office at Manchester, and if it had 100 branch offices, would carry on business within the meaning of the rule at each one of them. It seems to me that in these days of multiple stores the rule may be a convenient one, just as it has been held to be in the case of railway companies. Otherwise, there must be doubt what degree of business is sufficient for the purposes of the rule. If appearance can always be entered at the head office where the control abides, simplicity is reached. If real inconvenience results, there are ample means of removing the proceedings to the appropriate district.

I would dismiss the appeal.

Appeal allowed.

Solicitors: *Manser, Phillips & Co. for Myer Cohen & Co., Barry; Rhys Roberts & Co. for C. J. Hardwicke & Co., Cardiff.*

F. R. D.

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[54] [1924] 2 Ch. 101.

[55] [1952] 1 All E.R. 646, 657.

[56] 33 L.J.Ex. 41; 1 H. & C. 729.

COLE *v.* SOMERSET COUNTY COUNCIL.

1956
Oct. 15.

Lord Goddard C.J., Hallett and Donovan JJ.

Town and Country Planning — Development — Enforcement notice — Development carried out before permisssion withdrawn—Notice to discontinue use of land as caravan site — Validity of notice— Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3, 4.

The appellant was the owner of land which had since 1950 been used as a caravan site for members of the Caravan Club of Great Britain for recreational purposes. Before the war the land had formed part of a golf course. On April 24, 1954, the local planning authority served on the owner a direction, made under article 4 of the Town and Country Planning General Development Order, 1950,[1] and approved by the Minister of Housing and Local Government, that the permission granted by article 3 of the Order should not apply to development of the appellant's land in respect of "use for camping and the erection or placing of . . . caravans ". . . being development comprised in classes IV [2] and V of the "First Schedule to the [Order]." On February 9, 1956, the local planning authority served on the owner an enforcement notice under section 23 of the Town and Country Planning Act, 1947, requiring her to discontinue the use of her land as a caravan site, to remove the caravans therefrom, and to restore the land to its condition before the alleged development took place:—

Held, (1) that the development of the land, that is, the change of use from a golf course to a caravan site for recreational purposes, was a lawful development carried out under the terms of the general planning permission granted by article 3 of the Town and Country Planning General Development Order, 1950.

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[1] Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), art. 3: "Subject to "the subsequent provisions of this "Order, development of any class "specified in the First Schedule to "this Order is permitted by this "Order and may be undertaken upon "land to which this Order applies, "without the permission of the "local planning authority or the "Minister."

Art. 4: "If either the Minister "or the local planning authority is "satisfied that it is expedient that "development of any of the classes "specified in the First Schedule to "this Order should not be carried out "in any particular area, or that any "particular development of any of "those classes should not be carried "out, unless permission is granted "on an application in that behalf, "the Minister or the local planning "authority may direct that the per- "mission granted by article 3 of this "Order shall not apply to:—(*a*) all "or any development of all or any of "those classes in any particular area "specified in the direction, or (*b*) any "particular development, specified in "the direction, falling within any of "those classes."

[2] Class V of the First Schedule to the Town and Country Planning General Development Order, 1950: "The use of land, other than build- "ings and not within the curtilage "of a dwelling house, for the pur- "poses of recreation or instruction by "members of an organization which "holds a certificate of exemption "granted by the Minister of Health "under section 269 of the Public "Health Act, 1936, and the erection "or placing of tents or caravans on "the land for the purposes of that "use."

(2) That on their true construction the words in article 4 of the Order, "development . . . should not be carried out," referred to development to be done in the future and not to development which had already been carried out; that neither the Minister nor the local planning authority had power under it to withdraw the planning permission which had been given and acted upon; and that, therefore, the enforcement notice should be quashed.

CASE STATED by Somerset justices.

On March 9, 1956, a complaint was preferred by the appellant, Christine Helen Cole, against the respondents, Somerset County Council, that in purported exercise of powers contained in the Town and Country Planning Act, 1947, they served an enforcement notice on the appellant as owner of certain land at Burnham-on-Sea, requiring her to discontinue the use of the land as a caravan site, to remove the caravans therefrom, and to restore the land to its condition before the alleged development took place. The appellant applied for an order quashing or varying the notice pursuant to section 23 (4) of the Town and Country Planning Act, 1947.

At the hearing of the complaint on April 23, 1956, the justices found the following facts. In 1947 the land in question was purchased by Ernest J. Cole & Partners Ltd., a company of which the appellant was a director. In 1952 the land was conveyed by the company to the appellant as owner. Before the war the land had formed part of a golf course. In 1950 the land began to be used as a caravan site for members of the Caravan Club of Great Britain, which held a certificate of exemption granted by the Minister of Health under section 269 of the Public Health Act, 1936, and had continued to be so used. At the date of the enforcement notice there were six caravans on the site used for residential purposes.

On July 23, 1953, the Minister of Housing and Local Government approved a direction made by the respondents as the local planning authority, under article 4 of the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), that the permission granted by article 3 of the Order should not apply to development of the appellant's land in respect of "use for camping and the erection or placing of tents, "caravans or movable structures for the purposes of that use, "being development comprised in classes IV and V of the First "Schedule to the Town and Country Planning General Develop-"ment Order, 1950, . . ."

That direction was served on the appellant on April 24, 1954, and came into force on that date. On February 9, 1956, the respondents served on the appellant an enforcement notice, dated February 6, under section 23 of the Town and Country Planning Act, 1947, in respect of the use of her land as a caravan site.

The appellant contended, first, that as respects the use of land for the caravans of members of the Caravan Club of Great Britain, permission had been granted under Part III of the Town and Country Planning Act, 1947, for the development to which the enforcement notice related, in that the said use was development which took place in 1950 with permission granted by article 3 and class V of the First Schedule to the Town and Country Planning General Development Order, 1950; secondly, that the direction made under article 4 of the Order did not render unauthorized development carried out before it came into force but that the effect of the Order was only to require permission to be obtained for development of the classes specified in the direction when carried out after the direction had come into force; thirdly, that the reference in section 22 (3) of the Town and Country Planning Act, 1947, to the withdrawal of permission granted by a development order meant the withdrawal of permission where the development for which permission was granted had not been carried out; and, finally, that as regards the use of land for residential caravans, the enforcement notice was out of time in that it was not served within four years of the development being carried out.

It was contended by the respondents, first, that in respect of the use of land for the caravans of members of the caravan club the use was development which had been carried out without the grant of permission under Part III of the Act of 1947, in that the direction made under article 4 of the Order required permission to be obtained for development of the classes specified in the direction, whether carried out before or after the direction came into force; secondly, that as regards the use, section 22 (3) of the Act of 1947 provided that an application might be made for permission for development when permission for such development had been withdrawn (as in the present case).

The justices concluded that the respondents' contentions regarding the use of land for caravans of members of the Caravan Club of Great Britain were right; and that the contention of the appellant concerning the use for residential caravans was right. They therefore varied the enforcement notice to read: "It is

1956

COLE
v.
SOMERSET
COUNTY
COUNCIL.

"hereby ordered that you shall within one month . . . discontinue the use of the land as a caravan site except as to six caravans for residential (that is, non-recreational) purposes, remove the caravans therefrom, and restore the land to its condition before the development took place save as relates to the six said residential caravans."

The appellant appealed.

Roy Wilson Q.C. and *David Widdicombe* for the appellant. A statute does not have retrospective effect unless it is so specified in the Act itself; there is no such provision in the Town and Country Planning Act, 1947. Under section 18 (4) of that Act permission enures for the benefit of the land and it cannot be withdrawn by the Minister or the local planning authority once it has been given and acted upon. Once the change in the use of the land has taken place it is too late to withdraw permission; the only way the use of the land can then be restricted is by an order under section 26 of the Act, which would attract full compensation. The power to make directions under article 4 of the Town and Country Planning General Development Order, 1950, is comparable with the power to revoke planning permission under section 21 of the Act, and like the power to revoke, it only affects permission to use the land if exercised before the change of use has taken place (see section 21 (3)). The reference to article 4 directions in section 22 (3) of the Act shows that directions are linked with revocations in the scheme of the Act. The substitution in 1950 of the words "carried out" for "undertaken" in article 4 (1) of the order was done in order to make this point clear.

John Stephenson and *Norman King* for the respondents. It may be a hardship on the appellant to remove what she has erected under authority, but the Town and Country Planning General Development Order, 1950, prima facie authorizes minor and temporary alterations. That may not be true of the whole of the First Schedule but is true of Classes IV and V thereof, with which this case is concerned, i.e., Class IV which deals with recreational organizations, and Class V which refers to temporary development and temporary use. Article 4 of the Order applies to both past and future development and the Minister can withdraw permission in respect of both. The words in article 4 "should not be carried out" ought to be read as "ought not to be carried out." The question is whether when permission for use is withdrawn under article 4, that use ceases to be an authorized development.

Lord Goddard C.J. This is a case stated by justices for the county of Somerset, to whom the appellant applied to quash or vary an enforcement notice served under section 23 (4) of the Town and Country Planning Act, 1947. An enforcement notice is served by a local planning authority if it alleges that a person is doing something in contravention of planning permission, ordering the discontinuance or even removal of what is said to be contrary to the permission granted.

In 1950 some land at Burnham-on-Sea which had hitherto formed part of a women's golf course began to be used as a caravan site for the purposes of recreation and has since continued to be so used. At the material times there were on the land some six caravans which were used as permanent dwelling-houses. As those are expressly exempted in the justices' order I need not refer to them any further.

When the Town and Country Planning Act came into force, people were required to obtain planning permission for development of land. The Minister issued a general planning permission which was intended to enable the development which had been in force to go on and to keep matters in statu quo until the planning authorities were constituted and able to take over the administration of the Act. When the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), was made, the result was that people could develop land for certain purposes as set out in the Order. There is no doubt that the Order did permit the use of land which had not hitherto been so used as caravan sites for the purposes of recreation. The description of development which was allowed was, according to class V of the First Schedule to the Order, "The use of land, other than "buildings and not within the curtilage of a dwelling house, for "the purposes of recreation or instruction by members of an "organization which holds a certificate of exemption granted by "the Minister of Health under section 269 of the Public Health "Act, 1936, and the erection or placing of tents or caravans on "the land for the purposes of that use." In view of that, it is obvious that the use of this land as a caravan site was permitted by that Order.

Section 12 of the Act defines "development" and reads: "(1) Subject to the provisions of this section and to the following "provisions of this Act, permission shall be required under this

"Part of this Act in respect of any development of land which "is carried out after the appointed day. (2) In this Act, except "where the context otherwise requires, the expression 'develop-"'ment' means . . . the making of any material change in the "use of any buildings or other land . . ." The material change made here, and which was permitted by the Order, was a change from a women's golf course to a caravan site.

[His Lordship read article 3 of the Order, and continued:] It is not disputed that that article enabled the owner of the land to change its use to a caravan site used for the purpose of recreation. Article 4 is the one material to the present case.

[His Lordship read the article and continued:] It seems to me unarguable that article 4 applies to something to be done in the future. It does not apply to something which has been done under the permission which the Minister has granted. The Minister has said that anybody may develop his land for the purposes specified in the Order, among them making caravan sites for the purpose of recreation; but under this article he can prohibit the doing of it at a particular place, whether it be Burnham-on-Sea, Skegness, or Colwyn Bay. He can limit the application of this very wide permission to any particular area, or he can say that some particular development shall not be carried out. However, once he has given permission and somebody has acted on it, it does not seem to me he can then withdraw that permission altogether. In my opinion, what was done here was done under the terms of the general planning permission which made it a perfectly lawful change of use, and therefore a perfectly lawful development. Under this article, it seems to me that neither the local planning authority nor the Minister has any power to withdraw that permission which was given and which was acted upon. Perhaps, if it had not been acted upon with regard to the whole of the land, the local planning authority could have revoked the permission or attached certain conditions to it, but I am quite sure that where a change in the use of the land has occurred lawfully, this article does not permit the Minister to withdraw that permission ex post facto.

I am confining myself entirely to the question that is raised in this case, namely, whether or not this enforcement order is a valid order. In my opinion, it clearly is not. I express no opinion on the question whether the local planning authority can do in some other manner what they seek to do. It is simply a question whether the words in article 4 of the Order "should "not be carried out" refer to the carrying out of work in the future, as, in my opinion, they clearly do, or whether they refer to works already carried out, which I think they do not.

For these reasons, I think that the justices came to a wrong decision, and therefore this appeal will be allowed.

HALLETT J. I agree. I should like to emphasize what I think is the necessary distinction for present purposes between development and use. What we have been considering is whether a development is permitted and not whether a use after development is permitted. In section 12 (2) of the Act of 1947, to which my Lord has already referred, there are in addition to the words he read a few more words which help in that connexion. The words are as follows: "In this Act . . . the expression "'development' means the carrying out of building, engineering, "mining or other operations in, on, over or under land, or the "making of any material change in the use of any buildings or "other land." It seems to me that development is something that is done, and when it has been done the question of what has been brought into existence by the development arises. There are other provisions in this Act which concern user, for instance, in the sidenote to section 25: "Agreements regulating develop-"ment or use of land." In sections 26 and 27 there are certain provisions regarding the use of land. Like my Lord, I do not desire to say anything about what might have been done here, but I do desire to point out that articles 3 and 4 are concerned with development and not use. It seems to me that, confronted with these difficult questions, there may be confusion between prohibition of development and interference with a use after development. In my judgment, those are two separate things dealt with by separate proceedings, and in the present case the restriction upon development is not one which could be imposed after development had taken place.

For these reasons, I agree that the decision of the justices was wrong.

DONOVAN J. Like the other members of the court, I think that the words in article 4 of the Order of 1950 "development" which the Minister or local authority "is satisfied . . . should not "be carried out" refer to development which has not yet begun, or, if begun, has not yet been carried out in the sense of being completed. That construction is reinforced by the substitution of the words "should not be carried out" in the general Order of 1950 for the words "should not be undertaken" in the Town and

1956

COLE v. SOMERSET COUNTY COUNCIL.

Donovan J.

Country Planning General Development Order, 1948. It is also reinforced by the existence of sections 26 and 27 in the Act of 1947, which give power to order the discontinuance of the user of development already completed. The respondents are not able to give any reason why they have not put that power into effect in the present case. If, on its true construction, article 4 has no reference to development already permitted or completed, then it has no reference to the present case, and the respondents were not entitled to invoke it. I entirely agree with the other members of the court.

Appeal allowed.

Solicitors: *Arbeid & Co.; Sharpe, Pritchard & Co. for E. S. Rickards, Taunton.*

P. P.

1956
Oct. 11.

Lord Goddard C.J., Hilbery and Ashworth JJ.

MORRIS MOTORS LTD. *v.* HOPGOOD.

Factory—Dangerous machinery—Fencing—Horizontal milling machine —Machine completely fenced only while cutters in motion— Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)— *Horizontal Milling Machine Regulations,* 1928 (*S.R. & O.* 1928, *No.* 548), *regs.* 3 (1), 6.

A workman employed by the appellants in their factory to operate a horizontal milling machine, to which the Horizontal Milling Machine Regulations, 1928,[1] applied, placed the components to be milled by the machine in a jig which rested on a movable base and which advanced to bring the components into contact with the cutters. Between the cutters and the jig was a fence composed of vertical metal rods and when the jig was in a retracted position there was a gap in the fence through which access to the cutters was possible. The cutters were not set in motion until the jig was within one-eighth of an inch of the cutters, and before the jig reached that position the gap in the fence was fully closed. While he was operating the machine with the power switched on, his right hand was resting on the front of the jig, which moved forward and brought his hand into contact with the moving cutters, and he suffered injuries.

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[1] Horizontal Milling Machine Regulations, 1928 (S.R. & O. 1928, No. 548), reg. 3 (1): "The cutter or "cutters of every horizontal milling "machine shall be fenced by a strong "guard, properly adjusted to the "work, which shall enclose the "whole cutting surface except such "part as is necessarily exposed for "the milling operations."

Reg. 6: "The guards or other "appliances required by these regu- "lations shall be maintained in an "efficient state and shall be con- "stantly kept in position while the "milling cutter is in motion, except "when the tool setter is setting up "the machine."

On an information preferred by the respondent alleging contravention of regulation 3 (1) of the Regulations of 1928, it was found that the fence was a strong guard within regulation 3 (1):—

Held, that regulation 3 (1), which required that there should be a strong guard, must be read together with regulation 6, which required that that guard should be kept constantly in position while the cutters themselves were in motion and not during the whole of the milling operation; accordingly, the appellants were not in breach of regulation 3 (1).

CASE STATED by the Recorder of Birmingham.

The appellants, Morris Motors Ltd., were charged on an information preferred by Joan Beatrice Hopgood, an Inspector of Factories, that on April 22, 1955, at Drews Lane, Birmingham, in the factory occupied by them, the cutters of a horizontal milling machine were not fenced by a strong guard which enclosed the whole cutting surface except such part as was necessarily exposed for the milling operation, contrary to regulation 3 (1) of the Horizontal Milling Machine Regulations, 1928, and in consequence of such contravention one Malcolm Edward Perry suffered bodily injury. The appellants were convicted by Birmingham justices and appealed to quarter sessions.

The following facts were admitted before the recorder: The premises occupied by the appellants were a factory to which the provisions of the Factories Act, 1937, applied. The appellants employed in the factory a 15-year-old youth, Malcolm Edward Perry, whose duty was to operate a horizontal milling machine to which the provisions of the Horizontal Milling Machine Regulations, 1928, applied. The machine was operated by electrical energy controlled by a switch. The components to be milled were placed by the operator in a jig and clamped into position by a lever on the top of the jig. The jig was movable and designed to advance towards the cutters to bring the component into contact with the cutters. Between the cutter and the jig when in a fully retracted position was a fence composed of vertical metal bars adjustable in height. At all material times the said fence was a strong guard. When the jig was in the retracted position there was a gap in the fence through which access to the cutters was possible. On the advance of the jig it passed into the gap in the fence and completely closed it. The cutters were automatically set in motion and remained in motion only when the jig was within a distance of one-eighth of an inch from the cutting surface of the milling cutters, but at the moment the jig reached the position of one-eighth of an inch from the cutters, the combination of the jig and the fence formed a continuous fence.

The recorder found the following facts: On April 22, 1955, Perry was operating the machine with the electrical power switched on and clamped two components into the jig; when his hand was in between the front of the jig and the fence, the jig moved forward and entered the gap in the fence so that when the cutters were automatically set in motion the hand was severely injured by the milling cutters. No fault could be found with the machine.

It was contended by the appellants that so long as the cutters were in motion the combination of the jig and the fence formed a strong guard, and that the duty imposed on them by regulation 3 (1) of the Horizontal Milling Machine Regulations, 1928, was limited, by virtue of regulation 6 of the regulations, to periods of time when the cutters were in motion; further, that regulation 6 did not create an obligation separate or distinct from the obligation imposed by regulation 3, and that the gap in the fence when the cutters were not in motion did not constitute a breach of regulation 3 (1).

It was contended for the respondent that the guard prescribed by regulation 3 (1) was required to be in position and enclosing the whole cutting surface of the cutters except such parts as were necessarily exposed for the milling operations at all times during the currency of the milling operation, and that the milling operation extended to cover the whole period of time from the placing of the components into the jig to the removal thereof after the milling; further, that the gap in the fence when the jig was retracted was a breach of regulation 3 (1) because at that time the whole of the cutters was exposed, and that regulation 6 created a separate and distinct obligation from that created by regulation 3.

The recorder concluded that regulation 3 (1) required that during the whole of the milling operation the cutters of the machine should be fenced by a strong guard enclosing the whole of the cutting surface of the cutters except that part necessarily exposed; secondly, that that obligation was not limited to a period when the cutters themselves were in motion but that the milling operation began when Perry put the components into the jig.

Accordingly, he concluded that the appellants were in breach of regulation 3 (1).

The appellants appealed.

Marven Everett Q.C., A. E. James and *Escott Cox* for the appellants. The effect of the recorder's holding was that under regulation 3 (1) a duty to fence existed not only when the cutters were in motion but began earlier before the cutters were in motion and continued after the cutters had come to rest. That meant that the milling operation could not be confined to the time when the cutters were in actual motion. If that holding were right it would follow that the duty under these regulations is more onerous than that imposed by sections 14 and 16 of the Factories Act, 1937. The true view is that an offence is committed only when the dangerous part of the machine is not efficiently fenced while in motion or in use: *Smith* v. *Morris Motors Ltd. and Harris.*[2] Regulation 6 must be read together with regulation 3 (1), which was dealing with the cutters, not the moving jig. The draftsman here was dealing solely with the cutters themselves: see *per* Lord Porter in *Carroll* v. *Andrew Barclay & Sons Ltd.*[3]: "I conclude that it is risk arising from the motion of the machine "which is being guarded against . . . ," and Lord Reid in *Richard Thomas & Baldwins Ltd.* v. *Cummings.*[4]

W. A. Sime for the respondent. Regulation 3 (1) stands alone and is designed to prevent this sort of accident. The cutters were a dangerous part of the machine whether they were in motion or not and the guard should be kept in position at all times.

LORD GODDARD C.J. This is a case stated by the Recorder of Birmingham arising out of an appeal against a conviction of Morris Motors Ltd., who were charged before the magistrates on an information that "the cutters of a horizontal milling machine "were not fenced by a strong guard which enclosed the whole "cutting surface except such part as was necessarily exposed "for the milling operation contrary to regulation 3 (1) of the "Horizontal Milling Machines Regulations, 1928, and in consequence of such contravention one Malcolm Edward Perry "suffered bodily injury."

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[2] [1950] 1 K.B. 194; 65 T.L.R. 642; [1949] 2 All E.R. 715.

[3] [1948] A.C. 477, 484; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[4] [1955] A.C. 321, 333; [1955] 1 All E.R. 285.

1956

MORRIS MOTORS LTD. v. HOPGOOD.

Lord Goddard C.J.

Before I read the regulations it is necessary to state as concisely as I can the nature of the machine in question and of the accident which happened. The milling machine has a jig on a movable base, and the jig holds the component which is to be milled. When the machinery is started, this base moves forward and carries the component up to the cutters. The cutters are stationary when the jig begins to move and they remain so until the jig is within one-eighth of an inch of the cutters, when they start to revolve. There are perpendicular rods provided as a guard and the only space that is left exposed is the space sufficient to allow the jig to bring the component up against the cutters. The plaintiff had his hand on the front of the jig when it began to move forward; he kept it there and his hand was carried during the time it took for the jig to move one-eighth of an inch against the cutters. It was a curious accident and everybody had difficulty in finding out how it happened; but the fact that it did happen shows that there ought to be a guard to prevent such an accident. However, the recorder has found that the guard in this case complied with regulation 3.

The Horizontal Milling Machine Regulations, 1928, made under the Factories Act, 1937, take the fencing of milling machines out of the scope of sections 14 and 16 of the Act. [His Lordship read regulation 3 (1) and continued:] The recorder held that there was a strong guard consisting not only of these perpendicular rods which are on either side of the cutting surfaces of the machine, but also of the jig, because when it moved forward it filled up the whole of the space.

[His Lordship read regulation 6 and continued:] The recorder held that regulation 3 and regulation 6 have to be read disjunctively and create separate offences. With respect to the recorder, I cannot take that view. I think regulation 3 and regulation 6 are complementary; they must be read together. Regulation 3 provides that there must be a proper fence; then regulation 6 states that that fence must be kept in position when the machine is in motion. In other words, it would not be any offence if this machine were found not to have a fence when it was not running. As Lord Porter put it in *Carroll* v. *Andrew Barclay & Sons Ltd.*[1]: "I conclude that it is risk arising from the motion of the machine "which is being guarded against, whether the part concerned is "the transmission or dangerous in working." It is true that he was there concerned with sections 14 and 16 of the Factories Act, 1937, but it seems to me that exactly the same considerations apply here. The recorder's judgment would involve reading regulation 6 as though the guard should be constantly kept in position while any part of the machine is in motion, that is to say, from the moment the jig starts to move forward. He has held that the regulations require the machine to be fenced while any part of the milling operations is in progress. If the regulations permitted that meaning his judgment would be right because the milling operations may well be said to begin when the article to be milled is first put into the jig. I cannot read the regulations in that way, and although this case shows that there may be grounds for altering the regulations to prevent this sort of accident, the recorder's judgment was wrong, and we must allow the appeal and quash this conviction.

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[1] [1948] A.C. 477, 484.

Hilbery J. I am of the same opinion.

Ashworth J. I agree.

Appeal allowed.

Solicitors: *Herbert & Gowers & Co. for Philip Baker & Co., Birmingham; Solicitor, Ministry of Labour.*

P. P.

REGINA v. EVANS.

C. C. A.

1956
Nov. 12.

Lord Goddard C.J. and McNair J.

Criminal Law—Sentence—Preventive detention—Notice of intention merely to prove previous sentence of preventive detention defective—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 23.

A notice given under section 23 of the Criminal Justice Act, 1948,[1] which contains notice of intention to prove a previous

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[1] Criminal Justice Act, 1948, s. 23: "(1) For the purpose of determining "whether an offender is liable to be "sentenced to corrective training or "preventive detention or to be ordered "to be subject to the provisions of the "last foregoing section, no account "shall be taken of any previous con"viction or sentence unless notice has "been given to the offender and to the "proper officer of the court at least "three days before the trial that it is "intended to prove the conviction or "sentence; and unless any such "previous conviction or sentence is "admitted by the offender the ques"tion shall be determined by the ver"dict of a jury. (2) For the purposes "of this section, evidence that a per"son has previously been sentenced "to corrective training or preventive "detention shall be evidence of the "convictions and sentences which "rendered him liable to that sen"tence."

C. C. A.
1956
REGINA
v.
EVANS.

sentence of preventive detention only is defective in that it does not give notice of intention to prove three previous convictions on at least two of which the accused was sentenced to Borstal training, imprisonment or corrective training.

APPEAL against sentence.

On August 16, 1956, the appellant, Glynn Rhys Evans, was convicted at Bridgend magistrates' court of larceny of a bicycle, and he was committed for sentence to Glamorgan Quarter Sessions. He had been previously convicted of larceny and in 1951 had been sentenced to seven years' preventive detention but had earned remission and been released in March, 1956. Notice was given to him under section 23 (1) of the Criminal Justice Act, 1948, that it was intended to prove at the trial: " Convictions and " sentences as follows: ' Glamorgan Assizes in 1951, larceny, " ' four cases of stealing pedal cycles. Larceny of tools. Seven " ' years' preventive detention.' " On September 26, 1956, he was sentenced by Glamorgan Quarter Sessions to seven years' preventive detention. He appealed against sentence on the ground that the notice did not comply with the provisions of section 23 (1) and was defective in that it did not give notice of three previous convictions on two of which he had been sentenced to Borstal training, imprisonment or corrective training, but only notice of a conviction on which he had been sentenced to preventive detention.

E. B. McLellan for the appellant. This case raises a purely technical point concerning the proper form of notice to be served under section 23 of the Criminal Justice Act, 1948. The notice served on the appellant specified only one previous sentence, that of preventive detention, which was passed on the appellant on July 17, 1951. That notice was based on a misapprehension of section 23 (1). The sole question for the court is the construction of that subsection. Section 23 (2) goes only to proof of the convictions specified in the notice; it does not affect the form of the notice which must be served on the accused. On the true construction of section 23 (1) a notice should contain notice of intention to prove three previous convictions on at least two of which the accused was sentenced to Borstal training, imprisonment or corrective training.

Ithel Davies for the Crown. In interpreting the subsection the only point is that the purpose of the notice is to indicate what it is intended to prove against the accused, and it is only necessary to prove a previous sentence of preventive detention.

All that need be put in the notice is a previous conviction in respect of which the accused was sent to preventive detention, because it then fulfils subsection (2) by carrying with it proof of the previous convictions and sentences which rendered the accused liable to that sentence of preventive detention.

LORD GODDARD C.J. The appellant was convicted before the Bridgend magistrates' court of larceny of a pedal cycle which he had stolen from a workmate. He was committed for sentence to Glamorgan Quarter Sessions because he had 21 previous convictions, including convictions for cycle stealing, and was obviously an habitual criminal. He had already been sentenced to a term of seven years' preventive detention in 1951, but he earned some remission, and came out on March 31, 1956. He worked for some time at a smelting works, but he was dismissed for persistent absenteeism. On August 3 he got work as a goods porter on the railway; he worked quite well for eight days, but he then stole a bicycle from the mess room of the goods yard.

Notice was given to him under section 23 (1) of the Criminal Justice Act, 1948, that it was intended to prove at his trial: "Convictions and sentences as follows:—'Glamorgan Assizes in "'1951, larceny—four cases of stealing pedal cycles. Larceny of "'tools. Seven years' preventive detention.'"

The prisoner himself, who seems to know the provisions of the Act, has taken the point that he was not liable to be sent to preventive detention because the provisions of section 23 of the Act have not been properly carried out. It is a point of the highest technicality, but one to which the court unfortunately feels bound to give effect. There is a casus omissus in the Act which has not been appreciated, and we think that the point taken by the prisoner is a good one.

Section 21, which allows a court to impose a sentence of preventive detention, provides: "(2) Where a person who is not "less than thirty years of age—(*a*) is convicted on indictment "of an offence punishable with imprisonment for a term of two "years or more; and (*b*) has been convicted on indictment on "at least three previous occasions since he attained the age of "seventeen of offences punishable on indictment with such a "sentence, and was on at least two of those occasions sentenced "to Borstal training, imprisonment or corrective training; then, "if the court is satisfied that it is expedient for the protection "of the public that he should be detained in custody for a sub- "stantial time, followed by a period of supervision if released "before the expiration of his sentence, the court may pass, in "lieu of any other sentence, a sentence of preventive detention "for such term of not less than five nor more than fourteen years "as the court may determine." It will be observed that the requirements are that he should have been convicted on at least three previous occasions, and on two of them sentenced to Borstal training, imprisonment or corrective training. There is no provision that he should on a previous occasion have been sentenced to preventive detention. The point we are about to decide will affect not only sentences of preventive detention but proposed sentences of corrective training and also of a supervision order under section 22.

[His Lordship read section 23 and continued:] There is nothing there which states that notice may be given to a man that he has previously been sentenced to preventive detention, or that if once it be proved that he has been sentenced to preventive detention then it is not necessary to prove any previous convictions. Supposing he disputed that he had been previously convicted, then if a sentence of preventive detention were proved against him, it would be unnecessary to give any further evidence of previous convictions because the sentence of preventive detention would prove the previous convictions. Unfortunately, however, the section does not provide that notice of a previous conviction which resulted in preventive detention is all that is required. Notice must be given of three previous convictions and that on two of them he had been sentenced to Borstal training, imprisonment or corrective training.

The police in the present case thought, not unnaturally, that if they gave notice that he had been previously sentenced to preventive detention, that was all that was necessary. We have to hold in this case, most unfortunately, that this notice is a defective notice. It is defective in that it does not give notice of three previous convictions on two of which he had been sentenced to Borstal training, imprisonment or corrective training. Therefore, the sentence cannot stand. We cannot even make a supervision order in respect of this man because for the purpose of the supervision order one again has to give notice specifying the previous convictions. The only thing we can do is to set aside the sentence of preventive detention, and vary the sentence to one of seven years' imprisonment. He gets some advantage because if he behaves himself in prison he does get a longer period of remission than in the case of preventive detention. We hope that the attention of the Home Office will be called to

C. C. A.
1956
REGINA
v.
EVANS

this matter so that, if possible, an amending section can be put through to obviate the difficulty. The police authorities must be warned that it is not sufficient to give notice in the case of a man qualified for preventive detention that he has previously had a sentence of preventive detention, but that the previous convictions and sentences must be set out.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; W. Rosin, Bridgend.*

P. P.

CARDIFF CORPORATION *v.* ROBINSON.

1956
July 12.

Lord Goddard C.J., Ormerod and Donovan JJ.

Rates and Rating—Rateable occupation—Matrimonial home—Husband leaves wife in house rent free—Beneficial occupation by husband.

A husband lived with his wife and children in a house owned by his father. In November, 1954, differences having arisen between them, the husband left his wife and went to live elsewhere, agreeing that she should remain in the house rent free and that he should pay her £6 a week by way of maintenance. He waived any claims to the furniture left in the house and having paid the rates to the end of the financial year on March 31, 1955, notified the rating authority that he was no longer the occupier of the house and that his liability to pay the rates thereon had ceased. The father raised no objection to the wife remaining in the house. On a complaint by the rating authority against the husband for failure to pay the first instalment of the rates for 1955:—

Held, that, notwithstanding that the husband ceased to be in physical occupation of the house, by allowing his wife to remain there rent free he was discharging in part his obligation to maintain her and was thereby deriving a beneficial use from the house; accordingly, he continued to be in rateable occupation.

Robinson v. *Taylor* [1948] 1 K.B. 562; 64 T.L.R. 116; [1948] 1 All E.R. 291 questioned.

Case stated by the stipendiary magistrate for the City of Cardiff.

On July 27, 1955, the Cardiff Corporation, as the rating authority, preferred a complaint against John H. Robinson that he, being a person duly rated and assessed in their rating area by a general rate made on March 14, 1955, in the sum of £19 1s. 4d. (being the first instalment of the rate), had not paid that sum or any part thereof, but had neglected or refused so to do; and that he had neglected to pay the sum of £1 16s. in respect of water charges.

The magistrate found the following facts: The defendant was entered in the rate book as owner-occupier of a house and garage within the Cardiff Corporation's rating area, known as 11, Roath Court Road, and having a rateable value of £32. On March 14, 1955, the corporation duly made in respect of the financial year April 1, 1955, to March 31, 1956, a general rate of 23s. 10d. in the £ for the rating area, payable in advance by two equal half-yearly instalments, and notice of the making of the rate was duly given by them. The corporation duly demanded from the defendant as occupier of the hereditament payment of the sums of £19 1s. 4d. in respect of the first instalment of the general rate payable on April 1, 1955, and £1 16s. payable on the same date in respect of domestic water charged for the half-year ending September 30, 1955, being at the rate of 2s. 3d. in the £ per annum on the rateable value of the hereditament, but the defendant had neglected and refused to pay the sums or any part thereof. The hereditament was, at all material times, owned by the defendant's father and the defendant occupied the hereditament rent free until November, 1954. For some time before November, 1954, the defendant lived and made his home at the hereditament with his wife and two children. At least half the furniture in the house originally belonged to the defendant. In November, 1954, the defendant left the hereditament and went to reside apart from his wife at 84, Romilly Road, Cardiff, taking with him his clothes and personal effects in regular use and leaving those which were discarded or worn out. His wife continued to live at the hereditament with the children of the marriage. He left his furniture for the use of his wife and waived his claim thereto with the exception of one writing desk of sentimental value. The defendant took his key and later sent it to his father. There was no evidence to show that that key had been sent to the defendant's wife, or that she had asked for it. She had her own key which she kept. On November 25, 1954, a solicitor acting for the defendant informed the defendant's wife, through her solicitors, that the defendant would pay her a weekly sum of £6 for the maintenance of herself and the children; that no rent would be payable for the hereditament, but that out of her weekly allowance she must pay the rates and all charges for gas and electricity; that pending any permanent arrangement as to her continued occupation, she was not at liberty to create any tenancy or subtenancy of any part of the premises, though she could take in lodgers. On or about January 17, 1955, the defendant wrote to the rating department of the corporation a letter giving notice that he was neither the occupier nor resident at No. 11, Roath Court Road, as from January 1, 1955, and that he had arranged to pay the rates due up to the period ending March, 1955, after which date his liability would cease. No formal written agreement had been entered into between the defendant and his wife, but no legal proceedings had been taken by his wife against the defendant. She acquiesced in the terms of separation proposed by him, save that she had not paid the rates; the corporation had not rated her, or demanded any rate from her. There was no evidence to indicate that she had invited the defendant to resume cohabitation or that she would be prepared to allow him to do so if he wished to. Until the hearing of the proceedings before the magistrate, the defendant's father acquiesced in the defendant's wife and children continuing to live at the hereditament rent free. The defendant paid the rates in respect of the hereditament while he was in occupation thereof, and after he left in November, 1954, down to the end of that financial year on March 31, 1955.

It was contended by the corporation that the defendant, having admittedly been in rateable occupation of the hereditament before the times material in the present proceedings, continued to be, and was at all material times, in rateable occupation thereof, and was accordingly liable to pay the sums specified in the complaint.

It was contended by the defendant that rateable occupation being a question of fact in each case including the intentions of an alleged occupier, the defendant had, in the circumstances of the case, ceased at the material time to be in rateable occupation of the hereditament and was accordingly not liable to pay the sums specified in the complaint, and that the complaint should be dismissed with costs.

The magistrate was of the opinion that the defendant was no longer in beneficial occupation of the hereditament, having ceased to reside with his wife and having no intention of resuming cohabitation. The fact that the defendant still wished to claim one item of furniture and had left some discarded effects in the hereditament did not make him the rateable occupier, since the hereditament was, in the magistrate's view, occupied by his wife for her own benefit, in her own right, at her own volition. Accordingly, on February 3, 1956, the magistrate dismissed the complaint, but took the view that he was precluded by section 128 (3) of the Magistrates' Courts Act, 1952, from awarding costs to

1956

CARDIFF CORPORATION
v.
ROBINSON.

the defendant under section 55. Otherwise he would have awarded him five guineas costs.

The corporation appealed.

Patrick Browne for the corporation. The question is whether by leaving the premises the defendant divested himself of liability for rates. It is submitted that he remained in beneficial occupation. In *Reg.* v. *St. Pancras Assessment Committee* [1] Lush J. pointed out that a person was an occupier if he furnished a house and kept it ready for habitation even though he might not reside in it one day in the year. The two essential elements of rateable occupation are legal possession and user: see *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council.*[2] In the present case the defendant's wife had the right to live in the house rent free, and she was there as part of the maintenance paid to her. The defendant had to provide for his wife and he was doing so by providing the house and money. If he did not provide the house he would have to provide more money; therefore he was providing the house in part discharge of his obligation to his wife. The status of a wife who is left in the matrimonial home was considered in *Old Gate Estates Ltd.* v. *Alexander*,[3] in which it was held that where the husband left his wife and furniture in the house he remained in possession of the house. The first element of rateable occupation is actual possession; here the wife remained in the house in the husband's right and the magistrate's decision was wrong in law.

[DONOVAN J. Does it always follow that if the husband leaves his wife in the matrimonial home he is still in occupation?]

Not in all cases, for instance, if the wife was in the house by an order of the court. [*Middleton* v. *Baldock* [4] was referred to.] In *Robinson* v. *Taylor*,[5] where the husband was certified insane and was removed to a mental institution and the wife continued to live in the house, it was held that the wife was liable for the rates as sole occupier of the house. That case is distinguishable from the present because the vital issue there was the insanity of the husband. It was the insanity which prevented him from having any intention to occupy the house and the receiver could not have the intention. Insanity makes all the difference; for example, it would put an end to agency; so in the present case it would put an end to the quasi-agency of the wife. The husband might be in occupation through his furniture, but the receiver would deal with the position, as the administrator of his estate.

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[1] (1877) 2 Q.B.D. 581, 588.

[2] [1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 436.

[3] [1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822.

[4] [1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708.

[5] [1948] 1 K.B. 562; 64 T.L.R. 116; [1948] 1 All E.R. 291.

[DONOVAN J. Therefore the mere fact that a lunatic cannot form an intention is not a relevant consideration.]

No, it is the receiver who forms the intention, and it is submitted that the husband in that case never ceased to be in occupation. Singleton J. in that case took the view that the order appointing the receiver was in the nature of a disclaimer of any occupation by the husband immediately before the order. That distinguishes that case from the present where there was no order of the court.

Michael Evans for the defendant. The position of a deserted wife was considered in *Bendall* v. *McWhirter*,[6] where it was held that the wife was in occupation of the matrimonial home on the authority of the husband, which could only be revoked by an order of the court. She is the beneficial occupier and should be rated as such.

[LORD GODDARD C.J. In that case the husband was allowing the wife to live in the house as part of the maintenance due to her. The position is the same in the present case.]

Robinson v. *Taylor*[7] makes it clear that the test is: who is in physical occupation of the house? There it was held that after the appointment of the receiver of the husband's estate the wife was in rateable occupation of the matrimonial home.

[LORD GODDARD C.J. Insanity merely puts the receiver in the husband's shoes and enables him to dispose of the husband's property. If he leaves the furniture in the house he is liable to rates. Why is he not liable if he leaves his wife and children there?]

The husband returned the key to his father. It was the father who was allowing the wife to remain in the house, and not the husband. It is not denied that the fact of the wife's staying in the house is of some benefit to the husband; but it was not the husband's house.

[LORD GODDARD C.J. The father may put an end to the licence and then the wife can go to the justices for increased maintenance. The rating authority is not bound by any agreement between the husband and wife.]

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[6] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[7] [1948] 1 K.B. 562.

The primary question is: who is in physical occupation? On the facts here the wife is rateable and not the husband.

LORD GODDARD C.J. This is a case stated by the stipendiary for Cardiff and raises an unusual point not expressly covered by authority.

The circumstances are very simple. The respondent, John H. Robinson, is a man who was allowed to live with his wife and family in a house belonging to his father rent free. So long as he lived in that house there is no question that he was the rateable occupier, he having beneficial occupation. In November, 1954, however, differences arose between himself and his wife, and he left the house. He came to an arrangement with his wife that he was to pay her for the maintenance of herself and the children £6 a week, and she was to live in this house, which he had a licence to occupy, on certain terms which he dictated to her. There is a letter which says she is not to sublet, because that was a term between himself and his father, and, of course, at any time the father could revoke his licence, but he has not done so. The position is that, the respondent having left his wife and children, he is under an obligation to maintain them and, among other things, to provide a roof over their heads. He has done that by telling the wife that she may continue to occupy this house. Of course, that would only be so long as his father allowed the wife and children to live there. It seems to me obvious, therefore, that the husband has made this provision for his wife as part of the obligation he is under to maintain her. Therefore, he is using this house, which his father has allowed him to occupy, in the most beneficial way he can by housing his wife and children in respect of whom he is liable to provide a home. It is agreed, and no one can deny, that if the respondent goes out of the house and leaves his furniture in it, he is liable, so long as his furniture is there, to pay the rates because there is a beneficial occupation. If he chooses to leave the house and leave his wife and family there, why is it any different from leaving his furniture there? He may come to an arrangement between himself and his wife under which his wife agrees to pay the rates. That may be, but the local authority are not bound by any arrangement of that sort. The only question here is: has the husband got a beneficial occupation? I think that he has, because it enables him to provide for his wife and family who, if they had to provide a home for themselves, would naturally require more money from him.

With one exception, I do not think that the cases which have been cited have any real bearing on the present case. The cases under the Rent Restrictions Acts show that the wife has a right to remain in the matrimonial home. Here the wife is not staying in the house by virtue of a right given by statute, but under an agreement with her husband. It is agreed that part of her maintenance should be residence in this house; therefore, he is making a most beneficial use of the right which he has to occupy that house. The fact that he is not living there himself is neither here nor there. He has put his wife and family in the house, he being liable to maintain them, and that is part of the maintenance for which he is liable.

The only case which I think has any direct bearing on the present case is *Robinson* v. *Taylor*[1] in this court, and I say with all respect to that decision that it is one which may require consideration in another court hereafter. I do not say that I disagree with it, but there are some points I find difficult to follow. One difficulty I have in the case is that it seems to me that Humphreys and Singleton JJ. really put their judgments on different grounds. In any case, that was a case where the question of lunacy arose. The husband had become insane and the wife was occupying the house in consequence of an order of the court of protection. That court, in applying the husband's income and managing his property, made an order that the wife could occupy the house. The husband, of course, could know nothing about it or exercise any judgment on the subject because he was insane, and I do not think that that case has any bearing on this particular case. Here there is an agreement, and the agreement seems to me to show that the husband was using this house for the purpose of maintaining his wife and, therefore, had a beneficial occupation of the house. For these reasons, I disagree with the conclusion to which the stipendiary came, and this case must go back with a direction that a distress warrant must issue.

ORMEROD J. I agree, for the same reasons.

DONOVAN J. I agree. The point is not altogether an easy one, but I think the answer is clear. It is important to remember that up to November, 1954, the respondent was admittedly in occupation of this house. The ownership was in the respondent's father. What the respondent did after 1954 was to turn his existing occupation to account by leaving his wife and children living

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[1] [1948] 1 K.B. 562; 64 T.L.R. 116; [1948] 1 All E.R. 291.

1956

CARDIFF CORPORATION v. ROBINSON.

Donovan J.

there rent free. That enabled him to discharge his obligation to maintain his wife and children at a less pecuniary outlay than otherwise he would have had to incur. In that way, it seems to me that he is having and exercising a beneficial use of the hereditament and, therefore, does not cease to be in rateable occupation despite his physical absence.

I agree with the Lord Chief Justice that the case which does cause difficulty at first sight is *Robinson* v. *Taylor.*[2] That may turn on the special feature of insanity which was there present, but for the moment I cannot see why it should, seeing that the receiver stood in the same position as the insane person. It was held there that the insane person had ceased to be in rateable occupation and the wife, who was in physical occupation of the house, was the person so rated. By parity of reasoning it would seem to follow in the present case that the wife should be treated as the rateable occupier; but I cannot regard that case as over-riding the plain facts of the present case, namely, that the respondent is turning his occupation to account in the way I have described, and which constitutes, I think, continuance of his rateable occupation. I agree with the judgment proposed.

Appeal allowed.

Solicitors: *Theodore Goddard & Co. for S. Tapper Jones, Cardiff; Fortescue, Adshead & Guest for Richards & Guest, Cardiff.*

J. D. P.

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[2] [1948] 1 K.B. 562.

C. A.

1956
July 2, 3,
11, 12, 26.

Denning and Birkett L.JJ. and Roxburgh J.

RIDEN *v.* A. C. BILLINGS & SONS LTD.

[1954 R. No. 2505.]

Negligence—Contractor—Duty to licensee—Duty to residents in and visitors to premises where work in progress—Normal means of access to house rendered impassable—Only alternative route dangerous—Injury to visitor using it—Liability of contractors.

The respondent firm of contractors were engaged in reconstructing the front approach to a house owned and occupied by Government

Departments in which a caretaker and his wife resided. In the course of their work the contractors so obstructed the normal approach to the house through the path and forecourt that it became impassable. Their workmen suggested to the caretaker's wife that persons might go in and out of the house by using the forecourt of the house next door, a route which involved danger as it led through a narrow way between some bushes and the area of that house.

The plaintiff, a woman of 71, on a November evening visited the caretaker and his wife at 7.30 p.m., using the way through the forecourt next door on the advice of the wife. When leaving the house at 10 p.m. by the same way she fell into the area next door and received severe injuries. In an action against the contractors and the Government Departments (as owners and occupiers) Hallett J. gave judgment for the defendants, holding that in the circumstances none of them had been guilty of any breach of duty towards the plaintiff. On an appeal from the judgment in favour of the contractors:—

Held, by Denning and Birkett L.JJ., Roxburgh J. dissenting, that these defendants, as contractors doing work on the premises, were under a duty to use reasonable care to prevent damage to persons whom they might reasonably expect to be affected by their work, and that they had failed in such duty towards the plaintiff so that she was (subject to the question of contributory negligence) entitled to damages.

Clayards v. *Dethick* (1848) 12 Q.B. 439 applied.

Malone v. *Laskey* [1907] 2 K.B. 141; 23 T.L.R. 399 and *Ball* v. *London County Council* [1949] 2 K.B. 159; 65 T.L.R. 533; [1949] 1 All E.R. 1056 not followed.

Per Denning L.J. The defendants are liable, not because they are occupiers, but because they created a dangerous state of things and are under a duty to use reasonable care to prevent damage from it. It is true that they are under no duty to visitors to provide an alternative route for getting to the front door. (They might in some circumstances fulfil their duty of care to visitors by putting up a warning in clear terms: "Danger. Keep Out"; for that might suffice to prevent damage to them. The occupants of the house might then have grounds of complaint for blocking their access, but the visitors would not.) But if the contractors do provide an alternative route, on or off the premises, or point one out, as they did here, or it is an obvious deviation for a visitor to take, they are under a duty to use reasonable care to prevent damage to visitors who take that route. The words I used in *Hawkins* v. *Coulsdon and Purley U. D. C.* [1954] 1 Q.B. 319, 334; [1954] 1 All E.R. 97, namely: "A licensee can never complain of dangers "which are obvious or known to him" only apply where the visitor has full knowledge of the nature and extent of the danger and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured.

Decision of Hallett J. reversed.

C. A.

1956

Riden
v.
A. C.
Billings &
Sons Ltd.

Appeal from Hallett J.

The following statement of facts is taken from the judgment of Denning L.J.

On November 17, 1953, the plaintiff, Mrs. Riden, then aged 71, fell into a basement area in Cheltenham and was severely injured. The accident happened at a row of houses known as Cambray Place, Cheltenham. They are rather old houses with basements. They stand about 30 feet back from the street. Each is approached by a footpath and then four steps up to the front door. Each house has a forecourt and a basement area. The steps to the houses were fenced by iron railings on each side which were sufficient guard to prevent anyone falling from the steps into the basement area.

This case is concerned with Nos. 25 and 26, Cambray Place. No. 25 has been occupied for some 18 years by the Ministry of Works and used by the Commissioners of Customs and Excise as offices. On the top floor there lived a Mr. and Mrs. Privett who acted as caretakers. When this house was built it was approached from the street in the same way as the others by means of a footpath and steps to the front door: but many years ago an invalid lived there who could only get about in a wheeled chair. So there had been constructed for his benefit a sloping ramp made of paving stones which sloped up from the street in a continuous incline to the top of the steps, but with railings set into the ramp fencing it on each side. In November, 1953, the Ministry of Works determined to remove the sloping ramp, uncover the steps, and to restore the original approach by making a concrete footpath to the steps. They employed the defendants, A. C. Billings & Sons Ltd., as contractors to do the work. Billings started work on Monday, November 16. By the evening of Tuesday, November 17, the work had got to this stage: Billings had broken up the front half of the ramp which was near the street and had placed rough rubble onto it and a plank thwartwise across the ramp. They had thrown broken stones and debris on to the forecourt of No. 25. They had removed the railings on each side of the ramp and had put up a barricade of planks on one side (next to the basement area of No. 25) but they had put nothing in place of the railings on the other side next to No. 26. The workmen left the work in that state at 4.30 p.m. on November 17 when it was getting dark.

The result of Billings' activities was that there was no longer any safe means of access to the front door. Billings' men said that they made a plank walk up to the entrance with stakes and ropes alongside so as to guide people along it: but they were disbelieved on this point by Hallett J. The foreman said that they made the place safe for anyone leaving or entering the premises. They did nothing of the kind. The result was that anyone seeking to go in or out of No. 25 by the front door had to clamber up as best he could. The judge found there were four possible ways of doing this. None of them was at all convenient or safe but the least unattractive was the "fourth route." This route meant going on to the forecourt of the next-door house, No. 26, where there was an auction mart, and then skirting round some bushes (not far from the basement area of No. 26) and getting up on to the remains of the ramp on that side (where the railings had been removed) and thence into No. 25. Mrs. Privett, the caretaker's wife, went out that way in the afternoon at about 3 p.m. She thought that it was the only possible way to take. It was much safer than any other way. She said to the workmen: "How are we to get in and out?" They said to her: "You can go along on the auction mart side. That is the best "way." The judge found that they advised her to use that way. So she told her visitors to go that way. In particular, her brother and his wife went that way but, on leaving, her sister-in-law nearly had a nasty accident because the railings had been taken away on that side. Incidentally, her brother put a plank down to make the way easier. Later on in the evening, when it was dark, at about 7.30 p.m., Mrs. Riden, the plaintiff, called to see Mr. and Mrs. Privett, and Mrs. Privett told her to go that way. She got into the house safely, but when she was leaving by that way at about 10 p.m. in the dark, she fell into the basement area of No. 26 and was severely injured. There was a back door to No. 25 opening into a lane at the back, but this was kept locked at night, and Hallett J. considered that it would have been quite unreasonable to expect these various people to use it on this occasion. An action brought by the plaintiff against the contractors, the Ministry of Works, and the Commissioners of Customs and Excise was dismissed by Hallett J. The plaintiff appealed only against the decision in favour of the contractors, the first defendants.

G. G. Baker Q.C., *Michael Kempster* and *Andrew Bateson* for the plaintiff. This case is concerned solely with the law of negligence; no question of licensor and licensee arises. Having destroyed the safe means of access to the house, the defendants were under a duty to take reasonable care to prevent damage to

BIBL. LONDIN UNIV.

persons entering and leaving the premises. All that they did was to advise that the danger which they had created should be avoided by the adoption of another dangerous route. The plaintiff had knowledge of the danger, but is not debarred from suing by that knowledge [*Slater* v. *Clay Cross Co. Ltd.*[1] was referred to]; her knowledge of the existence of the area may be an element in considering whether there was contributory negligence, but it is nothing more. The plaintiff had no freedom of choice when exercising her legal right to enter and leave the house. It is not necessary for the plaintiff to establish that there was a trap; all that need be shown is an absence of reasonable care to prevent damage.

The development of the law in measuring the duty owed in such a case as this can be seen in *Corby* v. *Hill*[2]; *Gautret* v. *Egerton*[3]; *Smith* v. *London and St. Katharine Docks Co.*[4]; *Kimber* v. *Gas Light & Coke Co.*[5]; *Excelsior Wire Rope Co. Ltd.* v. *Callen*[6]; *Cooke* v. *Midland Great Western Railway Co. of Ireland*[7]; *Buckland* v. *Guildford Gas Light & Coke Co.*[8]; *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.*[9]; *Creed* v. *McGeoch & Sons Ltd.*[10]; *Hawkins* v. *Coulsdon and Purley U. D. C.*[11]; *Greene* v. *Chelsea Borough Council*[12]; *Slater* v. *Clay Cross Co. Ltd.*,[13] which is distinguishable from the present case only by the circumstance that the defendants were occupiers, and *Mooney* v. *Lanarkshire County Council.*[14] Here the defendants created such a dangerous state of affairs that no safe means of ingress and egress were left. Once it is established that the defendants owe a duty to persons frequenting the house they cannot escape liability because the plaintiff to escape the other dangers took the only practicable route, which they themselves had recommended. The plaintiff had no more freedom of choice in the matter than the successful plaintiff in *Clayards* v. *Dethick*,[15] where a cab owner, in order to get his horse out of his stable, was forced to lead it past a trench dug by the defendant, and recovered damages for the destruction of the horse; a similar decision is *The Highland Loch.*[16]

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[1] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[2] (1858) 4 C.B.N.S. 556.

[3] (1867) L.R. 2 C.P. 371.

[4] (1868) L.R. 3 C.P. 326.

[5] [1918] 1 K.B. 439; 34 T.L.R. 260.

[6] [1930] A.C. 404.

[7] [1909] A.C. 229; 25 T.L.R. 375.

[8] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.

[9] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.

[10] [1955] 1 W.L.R. 1005; [1955] 3 All E.R. 123.

[11] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[12] [1954] 2 Q.B. 127; [1954] 2 All E.R. 318.

[13] [1956] 2 Q.B. 264.

[14] 1954 S.C. 245.

[15] (1848) 12 Q.B. 439.

N. R. Fox-Andrews Q.C. and *R. C. Hutton* for the contractors. *Clayards* v. *Dethick*[17] was criticized in *Lax* v. *Darlington Corporation*,[18] where Bramwell L.J. said that a person going knowingly into danger is a volunteer, and must take the consequences of any injury. This claim is an attempt to widen the law and to extend the applicability of *Donoghue* v. *Stevenson.*[19] On the evidence no causal connexion is established between the defendants' acts and the plaintiff's injuries; she may well have slipped on the plank left by Mrs. Privett's brother. The cases show that it is only in certain circumstances that contractors working on premises owe a duty to visitors. It is not the law that a contractor is liable in respect of an obvious danger which he did not create, which existed on premises on which he was not working, and into which he had no legal right to enter. He owes a duty where there is physical propinquity between himself and the visitor, e.g., if a bag of tools is dropped on the visitor's head; or, when he places on premises on which he is working a thing which is dangerous in itself; or, if he creates a danger which may or may not constitute a trap, he must fence it or warn the visitor; or, if what he does amounts to a public nuisance. There must be a limit to his liability; because he cannot enter the premises next door and fence off the area, there is no reason why he should be liable for obstructions on the premises on which he is working.

In *Donoghue* v. *Stevenson*[20] the fundamental fact which led the House to hold that there was liability was that the consumer had no opportunity of inspection. Applying that reasoning to the present case, the conclusion must be that since the plaintiff was injured by falling into a pit of which she knew and which the defendants had not created, there was no duty to protect her from such a danger. The question of opportunity of inspection is illustrated also by *Candler* v. *Crane, Christmas & Co.*[21]

With regard to the cases, *Hawkins* v. *Coulsdon and Purley U. D. C.*[22] was a case of licensor and licensee, and the defective step was not obvious to the plaintiff. A licensee cannot complain of obvious dangers, and a contractor should not, on principle, be in a worse position than a licensor. In *Corby* v. *Hill*[23] there was a concealed trap in a drive which the defendant had created. In *Gautret* v. *Egerton*[24] the deceased was a licensee, and no duty was owed to him because he had full knowledge of the danger. In *Smith* v. *London and St. Katharine Docks Co.*[25] the defendants had laid a trap on the sole means of access provided by them to a ship. In both *Buckland* v. *Guildford Gas Light & Coke Co.*[26] and *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.*[27] children were concerned, there being in one case a hidden trap and in the other an allurement.

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[16] [1912] A.C. 312; 28 T.L.R. 213.

[17] 12 Q.B. 439.

[18] (1879) 5 Ex.D. 28, 34.

[19] [1932] A.C. 562; 48 T.L.R. 494.

[20] [1932] A.C. 562.

[21] [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426.

[22] [1954] 1 Q.B. 319.

There was no obligation in law on the defendants to provide alternative means of access, whether safe or unsafe.

[DENNING L.J. Your duty was to take reasonable care for the safety of people coming and going.]

Only in respect of the premises on which work is being done; there is no wide duty in the abstract; it must relate to the premises themselves. The defendants had no reason to forsee that a woman of 70 would go round in the dark and clamber up and down a steep step. [*Perry* v. *Thomas Wrigley Ltd.*[28] and *Creed* v. *McGeoch & Sons Ltd.*[29] were referred to.] In *Mooney* v. *Lanarkshire County Council*[30] the definition of the duties of a contractor limits them to the area on which he is working. In *Malone* v. *Laskey*[31] contractors who had repaired a lavatory cistern were held not liable when it fell and injured the occupant's wife.

[DENNING L.J. The apparent ground of decision in that case was that matters arising out of a contract can only be enforced by a party to it; that is contrary to *Donoghue* v. *Stevenson*.[32]]

In *Ball* v. *London County Council*[33] it was held that landlords were under no duty to the daughter of a tenant who was injured by the explosion of a boiler which they had installed; *Donoghue* v. *Stevenson*[34] was cited, but it was held that the case was governed by *Malone* v. *Laskey*.[35]

To summarize, (1) on the facts there was no duty on the defendants to do anything; (2) if there was a duty, it was merely to give a warning, and there could be no object in warning someone of a danger which she already knew of; (3) no representations were ever made by the defendants regarding the safety of the alternative route; (4) no causal connexion has been established between the plaintiff's fall and the alleged breach of duty.

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[23] 4 C.B.N.S. 556.

[24] L.R. 2 C.P. 371.

[25] L.R. 3 C.P. 326.

[26] [1949] 1 K.B. 410.

[27] [1954] 1 W.L.R. 592.

[28] [1955] 1 W.L.R. 1164; [1955] 3 All E.R. 243n.

[29] [1955] 1 W.L.R. 1005.

[30] 1954 S.C. 245.

[31] [1907] 2 K.B. 141; 23 T.L.R. 399.

[32] [1932] A.C. 562.

[33] [1949] 2 K.B. 159; 65 T.L.R. 533; [1949] 1 All E.R. 1056.

[34] [1932] A.C. 562.

[35] [1907] 2 K.B. 141.

Hutton following. The plaintiff must rely on the broad principle of *Donoghue* v. *Stevenson*,[36] where great stress was placed on the factor that there was no opportunity of intermediate inspection.[37] A vain effort to use this principle in order to get round *Cavalier* v. *Pope*[38] was made in *Otto* v. *Bolton and Norris*.[39] [*Davis* v. *Foots*[40] and *Travers* v. *Gloucester Corporation*[41] were also referred to.] In *Haseldine* v. *Daw & Sons Ltd.*[42] engineers employed by the owners of flats to inspect and maintain a lift were held to be under a duty to the users of the lift, as such persons had no opportunity of inspection; *Malone* v. *Laskey*[43] was not cited, and is inconsistent with it; the majority of the court based their decision on the principles of the law relating to dangerous chattels, and not on the law applicable to negligent repairs to property. In *Kimber's* case[44] the contractors had control of the whole of the premises, and the negligence imputed to them was that they failed to warn a stranger of the presence of a hole in the floor; in the present case there was no need of any warning. In *Horton's* case,[45] as here, the plaintiff had full opportunities of inspection. In *Slater's* case[46] there was the unusual circumstance that the driver failed to whistle and slow down before entering the tunnel, so that the plaintiff was taken unawares.

Baker Q.C. in reply. If a contractor creates a danger on premises where he is working, he owes a duty to those who come and go. If, after creating the danger, he negligently makes a dangerous alternative route across the premises next door, a person injured will have an action. If, instead of making a dangerous alternative route, the contractor adopts and recommends a route which is already dangerous, he cannot in principle be under any less liability. Where the contractor does nothing,

[36] [1932] A.C. 562.

[37] Ibid. 578, 602, 609, 615, 619.

[38] [1906] A.C. 428.

[39] [1936] 2 K.B. 46; 52 T.L.R. 438; [1936] 1 All E.R. 960.

[40] [1940] 1 K.B. 116; 56 T.L.R. 54; [1939] 4 All E.R. 4.

[41] [1947] K.B. 71; 62 T.L.R. 723; [1946] 2 All E.R. 506.

[42] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[43] [1907] 2 K.B. 141.

[44] [1918] 1 K.B. 439.

[45] [1951] A.C. 737.

[46] [1956] 2 Q.B. 264.

but must reasonably contemplate that visitors will use a dangerous side route, he is again liable.

The plaintiff had a legal right to visit the house, and it is idle to argue that the defendants owed her no duty, simply because she was not compelled to visit it. The defendants should have provided a safe route by using planks or by some such means. The fact that the plaintiff, having used the route once, did not fully appreciate the danger, is no bar to her right of action; it is merely a factor for consideration on the question of contributory negligence. There have been many common law cases dealing with injuries in factories where the workman was well aware of all the circumstances but nevertheless recovered damages.

Cur. adv. vult.

July 26. The following judgments were read.

DENNING L.J., after stating the facts: Mrs. Riden brought this action against the contractors, Billings Ltd., and the occupiers, the Ministry of Works, and the Commissioners of Customs and Excise. The judge dismissed her claim against all the defendants. Mrs. Riden does not appeal against his decision so far as the occupiers are concerned because she realizes that they entrusted the work to independent contractors. The occupiers did not know of the danger nor ought they to have known of it, and they ought not to be held liable. The plaintiff's advisers thus recognize, quite rightly, I think, the authority of *Haseldine* v. *Daw & Sons Ltd.*[1] I see nothing inconsistent with it in *Cremin* v. *Thomson*,[2] which was decided by the House of Lords later that year. But Mrs. Riden does appeal against the contractors, the first defendants, Billings Ltd., on the ground that they created a dangerous state of things and are liable for the consequences.

The judge found that the workmen, when they were knocking off work at 4.30 on the 17th, must have contemplated that there might have been people who would want to leave the house or to go to it, and that good workmen would have provided a substituted means of access. He also found that "but for the "action of the first defendants in destroying the pre-existing "normal and safe means of access and substituting no other "means of access for it, this accident would never have occurred."

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[1] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[2] (1941) 71 Ll.L.Rep. 1.

He found that "the situation which led to all these people "approaching the premises by the fourth route was caused by "the first defendants." Nevertheless, he found that the first defendants owed no duty to the plaintiff in respect of it. The judge felt "a great deal of sympathy with the plaintiff" but nevertheless "with very considerable regret" held that her claim against the contractors was not established.

The first question for consideration is whether the judge was right in holding that the first defendants were under no duty to the plaintiff. At the outset I desire to stress that we are not concerned here with the liability of an occupier of land but with the liability of a contractor who is doing work on land. There are many authorities which show that the contractor's duty is not confined to his duty under the contract to his employer. He is under a general duty imposed by law to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work.

Let me first consider the cases which show that there is such a duty. They do not spring from *Donoghue* v. *Stevenson*,[3] but start long before it and continue after it. As far back as 1848 a contractor, in order to make a sewer, dug a trench in a private passage leading to a mews. He negligently failed to fence the opening. Whilst a cab-owner was leading out his horse, it fell into the trench and was killed. The contractor was held liable for negligence: see *Clayards* v. *Dethick*.[4] In 1856 a building contractor placed a pile of slates on a private road leading to a lunatic asylum, and left them unlighted at night. A visitor ran into them in the dark. The contractor was held liable for negligence: see *Corby* v. *Hill*.[5] In 1918 a gas company, when putting gas into a private house, made a hole in the floor and failed to warn a visitor of the danger. They were held liable for the injury which resulted: see *Kimber* v. *Gas Light and Coke Co.*[6] Those cases were all before *Donoghue* v. *Stevenson*.[7] The later cases are reinforced by the authority of that decision. Thus, in 1941, a firm of engineers repaired a lift, but they did it so negligently that when a visitor used it next day, the lift fell and injured him. The engineers were held liable: see *Haseldine* v. *Daw & Sons Ltd*.[8] In 1954 a local authority, when making up the private way to a house, left a protruding piece of metal and a visitor fell over it and was injured. They were held liable: see *Mooney* v. *Lanarkshire County Council.*[9]

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[3] [1932] A.C. 562; 48 T.L.R. 494.

[4] (1848) 12 Q.B. 439.

[5] (1858) 4 C.B.N.S. 556.

[6] [1918] 1 K.B. 439; 34 T.L.R. 260.

[7] [1932] A.C. 562.

[8] [1941] 2 K.B. 343.

All the cases which I have mentioned were decisions of appellate courts. There are many cases at first instance to the same effect. A good illustration is *Brown* v. *Cotterill,*[10] where a monumental mason put up a tombstone so negligently that it fell and injured a child. Lawrence J. (now Lord Oaksey) held the mason liable. The cases show, moreover, that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work, whatever the capacity in which they come, whether as invitees or licensees or as other contractors: *Clelland* v. *Edward Lloyd,*[11] *per* Goddard J.; *Simmons* v. *Bovis Ltd.,*[12] *per* Barry J.; or even, in some cases, as children trespassing: see *Buckland* v. *Guildford Gas Light & Coke Co.,*[13] *per* Morris J.; *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.,*[14] *per* Ormerod J.; *Creed* v. *McGeoch & Sons Ltd.,*[15] *per* Ashworth J.

The duty of care of which I have spoken is not confined to contractors. It is a duty which rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty as a contractor. The reason is because the duty arises, not out of the fact of occupation, but out of the fact that he is doing work which he knows or ought to know may bring danger to others; and that gives rise to a duty of care: see *Dunster* v. *Abbott*[16] and *Slater* v. *Clay Cross Co. Ltd.*[17]

Now I must come to two cases which cannot be reconciled with this long line of authorities. The first case is *Malone* v. *Laskey,*[18] where the defendants, under contract with a tenant, repaired the lavatory cistern in a house and did it so negligently that a few months later it fell on the wife and injured her. It was held that she had no remedy because, in the words of Fletcher Moulton L.J., "no rights can be acquired under a "contract except by parties to the contract." That is a fallacy which was often invoked in the nineteenth century but was exposed in *Donoghue* v. *Stevenson*.[19] But not only is *Malone* v. *Laskey* [20] founded on a fallacy; it is inconsistent with the later decision of this court in *Haseldine* v. *Daw* [21] (where the lift engineers were held liable) and cannot stand with it, as Mr. Hutton frankly admitted. Of the two, I have no doubt that *Haseldine* v. *Daw* [21] should prevail.

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[9] 1954 S.C. 245.

[10] (1934) 51 T.L.R. 21.

[11] [1938] 1 K.B. 272; 53 T.L.R. 644; [1937] 2 All E.R. 605.

[12] [1956] 1 W.L.R. 381; [1956] 1 All E.R. 736.

[13] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.

[14] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.

[15] [1955] 1 W.L.R. 1005; [1955] 3 All E.R. 123.

[16] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[17] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[18] [1907] 2 K.B. 141; 23 T.L.R. 399.

The second case is *Ball* v. *London County Council*,[22] where landlords negligently installed a boiler in a dwelling-house without fitting a safety valve. Seven years later it exploded and injured the tenants' daughter. She failed in her claim. The decision can be explained perhaps on the ground that the landlords' negligence was not the cause of the injury. Tucker L.J. said: "What "caused the explosion were two very unusual circumstances;— "first, the very severe winter, and, secondly, the ill-advised "action of Miss Ball in lighting this boiler when the pipes were "frozen." But the court went further and said that the case was covered by *Malone* v. *Laskey*.[23] No one drew the attention of the court to the fallacy in that case; and no one referred to *Haseldine* v. *Daw*.[24] In the circumstances, the case cannot be considered as of any higher authority than *Malone* v. *Laskey* [23] itself.

I think, therefore, that those two cases can be put on one side, leaving the principle intact that a contractor doing work on premises is under a duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work. Mr. Fox-Andrews admitted this principle in some part. He admitted that the contractor was under a duty of care in respect of the premises on which he was working, but he denied that it extended beyond those premises. Hence he admitted that, if Mrs. Riden had fallen on the rubble on No. 25, whilst going to No. 25, the contractors might have been liable for the danger they created: but he said that their liability ended when she was not on No. 25 at all. I do not think this limitation is well founded. It is based on a confusion between the liability of an occupier and the liability of a contractor. If it were sought to make the ocupiers of No. 25 liable because they were occupiers and nothing else, their liability would, of course, be confined to No. 25: but that is not this case. The defendants are liable, not because they are occupiers, but because they created a dangerous state of things and they are under a duty to use reasonable care to prevent damage from it. It is true that they are under no duty to visitors to provide an alternative route for getting to the front door. (They might in some circumstances fulfil their duty of care to visitors by putting up a warning in clear terms " Danger. Keep Out ": for that might suffice to prevent damage to them. The occupants of the house might then have grounds of complaint for blocking their access, but the visitors would not.) But if the contractors do provide an alternative route, on or off No. 25, or adopt an alternative route, or point one out, as they did here, or it is an obvious deviation for a visitor to take, they are under a duty to use reasonable care to prevent damage to visitors who take that route. A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger.

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[19] [1932] A.C. 562.
[20] [1907] 2 K.B. 141.
[21] [1941] 2 K.B. 343.
[22] [1949] 2 K.B. 159, 173; 65 T.L.R. 533; [1949] 1 All E.R. 1056.
[23] [1907] 2 K.B. 141.
[24] [1941] 2 K.B. 343.

On the findings of the judge it seems to me quite clear that the contractors here did not take reasonable care to prevent damage. They knew or ought to have known that people would want to come in and out of No. 25 and should either have made a safe route on No. 25 (as they said they did and were not believed) or they should have made the " fourth route " (which they advised) reasonably safe. They did neither. They did not even give any warning of danger. They were, therefore, in breach of their duty.

The next argument of Mr. Fox-Andrews was that the duty on the contractors was at most a duty to warn the visitors of any danger on the route: and it was superfluous to warn Mrs. Riden, since she must be taken to have known of the danger. She had got into the premises by the " fourth route " and must have known the state of it. Mr. Fox-Andrews particularly relied on some words I used in *Hawkins* v. *Coulsdon and Purley U. D. C.*[25]: " A licensee can never complain of dangers which " are obvious or known to him." I must explain that those words only apply where the visitor has full knowledge of the nature and extent of the danger—full appreciation of it—and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured. In those circumstances he cannot complain, for the simple reason that the accident is then solely his own fault. But, short of that, he can complain.

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[25] [1954] 1 Q.B. 319, 334; [1954] 1 All E.R. 97.

The earliest case where this point was distinctly raised and decided is *Clayards* v. *Dethick*,[26] which I have already mentioned. The cab owner knew that it was dangerous to try to take his horse out of the mews, past the trench, but he was not free to avoid the danger. It was the only way out. He could not be expected to refrain altogether from coming out of the mews merely because the contractors had made the passage in some degree dangerous. Despite his knowledge of the danger, he was held to be entitled to recover. Lord Bramwell criticized the decision in one or two cases and also in an appendix to Smith on Negligence, 2nd ed. (1884), p. 275. Lord Bramwell wished to hold that knowledge of the danger was a bar to a person complaining of it, for instance, that it was a bar to a servant suing his master for an unsafe system of work: and was also a bar to a passenger by train, injured in alighting, from suing the railway company. There are innumerable cases which show that Lord Bramwell was wrong. His views were decisively rejected by the House of Lords in *Smith* v. *Baker*,[27] in spite of the fact that he presented them there in person. The decision in *Clayards* v. *Dethick*[28] is now unimpeachable. The effect of it was well stated in Smith on Negligence, cited above, at p. 235: "The defendant is not excused merely because the "plaintiff, knowing of a danger created by the defendant, "voluntarily incurs the danger; for the defendant may have so "acted as to induce the plaintiff as a reasonable man to incur "the danger." The authority of *Clayards* v. *Dethick* is further enhanced by the approval given to it by Sir Frederick Pollock. He said that "principle is for it and no accepted authority "against it." Pollock summarized the decision succinctly in these words: "Whether the plaintiff had suffered by the defen-"dants' negligence, or by his own rash action, was a matter of "fact and degree properly left to the jury." See Pollock on Torts, 15th ed., p. 369.

Such was the position before the Law Reform (Contributory Negligence) Act, 1945. Since the Act the same principle applies, subject to apportionment. I stated it in *Slater* v. *Clay Cross Co. Ltd.*[29] in these words, to which I adhere: "knowledge of the "danger is only a bar where the party is free to act on it, so that "the injury can be said to be due solely to his own fault. . . . "Where knowledge of the danger is not such as to render the

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[26] 12 Q.B. 439.

[27] [1891] A.C. 325; 7 T.L.R. 679.

[28] 12 Q.B. 439.

[29] [1956] 2 Q.B. 264, 271; [1956] 2 All E.R. 625.

C. A.
1956

Riden
v.
A. C.
Billings &
Sons Ltd.

Denning L.J.

"accident solely the fault of the injured party, then it is not a "bar to the action but only a ground for reducing the "damages." This principle has the merit that it is in complete accord with the recommendations of the Law Reform Committee in regard to occupiers. Contractors should be in no different position.

Applying this principle to the present case, I think it plain that Mrs. Riden did not fully appreciate the danger of the "fourth "route." She said "I thought it was safe." She did not realize how close the basement area was. She said "I could not "say how far it would be." Even if she had fully appreciated the danger, I do not think she was entirely free to avoid it. She could not reasonably be expected to stay in the house all night. She could have asked for the back door to have been opened, but, as the judge said, it was hardly negligent of her not to do so. In my opinion, therefore, her knowledge was not such as to be a bar to the action, but only is a ground for reducing the damages. It is to be noticed that at the time the judge decided this case, *Slater* v. *Clay Cross Co. Ltd.*[30] had not been decided or reported. If it had been, I feel sure that the judge would have followed it and would not have felt bound regretfully to dismiss the claim.

There remains the question of reducing the damages. The judge found that "she herself contributed very largely indeed to "her accident, because with that danger present to her mind— "it should have been present to her mind—she nonetheless pro- "ceeded on her way, taking no precaution at all, except that "she stopped for one moment at the top of the ramp to try to "recover from the effect of coming out of light into darkness." In view of this finding I think she should be found equally to blame and the damages reduced by one-half.

On reading the medical reports I would assess the general damages at £1,200. The judge found the special damage to be £22 16s. The total is £1,222 16s. of which one-half is £611 8s. I would allow the appeal and give judgment for the plaintiff accordingly.

Birkett L.J. This appeal from a judgment of Hallett J. raises questions of some difficulty and great importance. In my judgment, the greatest difficulty in the case is to be resolved by an examination of the exact facts of the case, and although my Lord has stated them with some fullness in his judgment, it will be necessary for me to refer again to the principal facts to explain the reasons for my own conclusions.

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[30] [1956] 2 Q.B. 264.

The present appeal is concerned only with Messrs. Billings and Sons Ltd. as defendants. They were a firm of contractors employed by the Ministry of Works to make certain alterations to the premises at No. 25, Cambray Place, Cheltenham. The house, No. 25, was occupied by the Ministry of Works, and was in fact used as offices by the Commissioners of Customs and Excise. The plaintiff, Mrs. Riden, was injured on the premises when Messrs. Billings and Sons Ltd. were doing the work for the Ministry of Works. Mrs. Riden, having failed to make anybody liable for her injuries and damage before Hallett J., now seeks to make Messrs. Billings and Sons Ltd. solely liable in this appeal.

The work which the contractors were doing for the Ministry on November 16 and 17, 1953, was to remove the sloping ramp which led from the street to the top of the steps at the front door of No. 25, preparatory to making a concrete footpath to the foot of the steps. On November 17 at about 4.30 in the afternoon the work had reached the stage when there was no longer any way to the front door that could safely be used on the land of No. 25, in place of the old sloping ramp. The ramp had been broken up in part, the broken stones and debris encumbered the forecourt, and the railings which formerly stood on each side of the steps to the front door had been removed. Some planks had been put next to the basement area of No. 25, but nothing had been put next to the basement area of No. 26.

The first fact that emerges with some clearness, therefore, is that the defendants had destroyed the formerly existing way to the front door, and had put nothing in its place. It is not without significance to observe that in the court below the defendants sought to prove that although they had destroyed the existing way to the front door, they had provided a temporary way by the use of planks and stakes and ropes, which could be used with safety by those desirous of entering or leaving the house by the front door. The evidence of the witnesses called for the plaintiff convinced the judge that no such temporary way had been made at all, and that the defendants' witnesses were not to be believed on that point; but the attempt to set up a false case would seem to emphasize the fact that the defendants' workmen realized that they had destroyed the formerly existing way to the front door, and it would seem that they were anxious to show that they had not left the premises in that condition, but had in fact provided a safe, temporary way. This can only have been on the footing that the defendants' workmen realized and accepted that there would be people who would wish to use the front door as a means of access to the house.

The judge dealt with that matter in this way: "As to the "first point, the plank walk, the plaintiff's witnesses were all "strenuously agreed about it. They denied that there was any "such walk, and I am satisfied beyond question that their denials "were true. The general foreman employed by the first defen-"dants, who visited the work from time to time, having many "other jobs to attend to, said that on the evening of the day in "question the plank walk and barriers were not in position; that "the barriers ought to have been put into position by the work-"men before they left; and that the plank walk and barriers were "in position the following day. I do not believe him."

Then a little later: "The next witness, Mr. Bound, who was "actually in charge of the work, when I asked him a question to "make sure there was no mistake, made it quite clear there was "no plank walk, never had been, and that there were not any "barriers. As regards those witnesses of fact then, it seems to "me it is quite clear that what the plaintiff and her witnesses "said was true."

But to most houses there is, of course, a front door and a back door, and the question of this back door was discussed in the evidence in the court below, and was made the subject of some argument in this appeal. The caretakers of the premises at No. 25 were a Mr. and Mrs. Privett, and they lived on the top floor of the premises. The back door led into a lane, and from the lane it was possible ultimately to get to the street. From the evidence given before him Hallett J. thought it would have been quite unreasonable to have expected the Privetts or their friends, including Mrs. Riden, to use the back door. Mrs. Privett said the back door was locked at 5 o'clock, and it seems to be the evidence that nobody thought the back door was to be considered as an alternative entrance to the house.

Mrs. Riden herself, when asked in cross-examination "Was "there anything in fact to prevent you going into the house by "the back way?", said "Well, it was always kept locked. The "back entrance was always kept locked. I always used the "front." Then Hallett J. said later: "Had you ever known "the back door to be used by anyone? (A.) It used to be before "she went to live up in the top flat. Then I believe she always "kept that locked, the bottom." So Mrs. Riden and Mrs.

Privett differed in that matter, and the judge in his judgment used the language which Mrs. Riden used in that evidence I have quoted.

About 3 o'clock in the afternoon of the 17th Mrs. Privett went out of the house. She went by the front door and took the route to the street which Mrs. Riden took some hours later when she met with her accident. Nobody seems to have suggested to Mrs. Privett that she should use the back door, and she herself apparently never thought of doing so. The defendants' workmen advised her to use the way she did use, and none of them suggested the use of the back door. Mrs. Privett advised her relatives to use the same way that she used, and again nobody seems to have considered the back door a reasonable alternative. In my view, I regard the question of the back door as settled, so far as this appeal is concerned, by the finding of Hallett J.

What, then, was the duty of these contractors in those circumstances? It was submitted to Hallett J. that the defendants, having destroyed the existing means of access to the front door of the house, were under a duty to provide a safe alternative way; but the judge decided that the defendants were under no duty at all to Mrs. Riden in the circumstances of the case. The first question, therefore, is: was the judge right or was he wrong?

Mr. Fox-Andrews submitted to us that if there was any duty on the defendants, the full extent of the duty was to warn the plaintiff of dangers which they knew to exist, or of which they ought to have known. If there had been a breach of that duty by the defendants, he submitted that the accident to Mrs. Riden was not occasioned by the breach. He laid great emphasis upon the fact that a plank had been placed near to the basement area of No. 26 unknown to the defendants, and that the plaintiff had slipped on this plank; and of this plank the defendants had no knowledge. The plaintiff, he said, fell the moment her foot touched the plank and the defendants had nothing to do with it. He submitted that a contractor cannot be liable in respect of an obvious peril which he did not create, on premises on which he is not working, and on land on which he would have no legal right to enter.

I do not think that the plank, which had been placed by a Mr. Brown to save his wife's stockings, as the evidence discloses, when travelling this route, added anything to the danger of the route, and the conclusions to which I come may be thus summarized: 1. The defendants had destroyed the only reasonable and safe entry to the house by the front door. 2. They had provided no alternative of any kind, although they falsely said by their workmen that they had. 3. They knew that an alternative way from No. 26 was being used by people coming to and going from the house, and they must have known that the use of that way was attended by considerable danger. 4. They had themselves recommended the use of that way to Mrs. Privett by their workmen, and it was reasonably to be contemplated that she would pass this advice on to all those who wished to come to or to leave the house on business or pleasure. 5. They took no steps of any kind, either by way of prohibition, or warning, or lighting, or fencing, to make known the dangers attending the use of that route by persons going to or coming from the house.

A great number of cases were cited to the judge and were cited to us relating to the liability of occupiers and contractors. Many of them were cases where the contractor had created a danger and had allowed persons with no knowledge of the danger to be injured, as in *Corby* v. *Hill*[31] and *Kimber* v. *Gas Light and Coke Co. Ltd.*[32] Mr. Fox-Andrews and Mr. Hutton both discussed at some length *Donoghue* v. *Stevenson*,[33] and the recent case in the Court of Appeal of *Slater* v. *Clay Cross Co. Ltd.*,[34] in which the judgment of Ashworth J. was upheld.

With great respect to Hallett J., I have come to the conclusion that he was wrong in holding that the defendants were under no duty to the plaintiff in the circumstances of this case. In my judgment the defendants were under a duty to use reasonable care to see that in the situation they themselves had created no harm should come to persons who might reasonably be expected to enter or leave the premises by the front door. Knowing as they did that persons would wish to use the front entrance, and that they had destroyed the only safe way, they did nothing to fulfil the duty which I think rested upon them, and are in consequence in breach of their duty to Mrs. Riden.

But the case is far from ending there. I have found the position of Mrs. Riden to be one of great difficulty, and for my part I think it to be the chief problem in the case. That the defendants owed a duty to her in the circumstances I do not doubt, but whether she disabled herself from recovering from the defendants by her own behaviour is a most difficult question indeed. Mr. Fox-Andrews naturally relied on *Hawkins* v. *Coulsdon and Purley Urban District Council*,[35] where the words of

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[31] 4 C.B.N.S. 556.

[32] [1918] 1 K.B. 439.

[33] [1932] A.C. 562.

[34] [1956] 2 Q.B. 264.

[35] [1954] 1 Q.B. 319, 334.

Denning L.J. were both plain and strong: "A licensee can never "complain of dangers which are obvious or known to him."

Mr. Fox-Andrews said that Mrs. Riden was certainly in no better position than a licensee; the dangers of the route to the house which she took were both obvious and known to her, for she had travelled that very route once before that very day she met with her accident, and had seen the place for herself, and had negotiated its dangers and difficulties. He also said that if the duty of the defendants was to warn, the breach of that duty was not the cause of the accident, for she knew as much as any form of warning would have told her.

On the other hand, there is the important case of *Clayards* v. *Dethick*.[36] That case is now a hundred years old and its bearing on the present case is, I think, important and perhaps decisive. The danger in that case was an open trench in a private road, made by a contractor and left unfenced. The private road led to the stables where the plaintiff kept his horses for use in his business as a cab proprietor. It was the only way from the stables to the road. The plaintiff knew of the danger, and the evidence is striking.

The facts, very shortly, were these[37]: "the plaintiff was a "cab proprietor, having stables in Gower Mews, Gower Street. "The mews communicated with the street by a passage 13½ feet "wide and 56½ feet long, and had no other outlet. In November "1845, the defendants, acting under directions from the commissioners of sewers, were deepening a sewer in Gower Street, and "carrying a drain, in communication with it, up the passage "leading into Gower Mews. For this purpose they made an open "trench about 13 feet long and 6½ feet wide, but not in the middle "of the passage, the unbroken space on one side being about 4½ "feet, and on the other side 2½ feet. The opening was not fenced. "Before the day on which the accident in question happened, "the commissioners had given notice to the occupiers of stables "in the mews that the trench would continue open for a day or "two longer, and they must put up with it; and had advised "them to get other stables. On November 19th, the excavators "had thrown the earth and gravel from the trench (unavoidably "as was represented on behalf of the defendants) upon the wider "space between the trench and the wall, to the height of four "feet. About five in the afternoon of that day, the plaintiff was "bringing one of his horses out of the mews, and was about "to put down planks for the purpose of getting him over the

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[36] 12 Q.B. 439.

[37] Ibid. 441.

C. A.
1956

RIDEN
v.
A. C.
BILLINGS &
SONS LTD.

Birkett L.J.

"narrower space, which was least obstructed. The defendant "Davis asked him what he was going to do, and said he would "not be answerable for any thing that happened by taking the "horse over in that manner. The plaintiff asked how he was to "do it; and he said that he must get the horse out. The defendant said: 'Take him over on the other side; and I will be "'answerable.' The plaintiff, with assistance, led the horse out, "over the gravel. A little before six in the same evening, the "plaintiff endeavoured to get another horse out in the same direction (neither defendant being then present); but the rubbish "gave way; the horse fell into the trench, and was strangled in "an endeavour to drag him out with ropes."

The Lord Chief Justice left it to the jury to say whether the defendants had been guilty of culpable negligence in not fencing the trench. Then he went on to say this[38]: "if the defendants' "witnesses were to be believed, and the plaintiff on the second "occasion had, in defiance of warning, incurred an evidently great "danger, this was a rashness on his part which would excuse the "defendants: but that it could not be the plaintiff's duty to "refrain altogether from coming out of the mews merely because "the defendants had made the passage in some degree dangerous: "that the defendants were not entitled to keep the occupiers of "the mews in a state of siege till the passage was declared safe, "first creating a nuisance and then excusing themselves by giving "notice that there was some danger: though, if the plaintiff had "persisted in running upon a great and obvious danger, his action "could not be maintained." And he left it to the jury to say whether or not the plaintiff had so acted. The jury found a verdict for the plaintiff with damages.

A rule nisi being granted, Coleridge J. said this[39]: "It was "necessary for the defendants to shew a clear danger and a "precise warning. Whether these facts existed or not, was for "the consideration of the jury; and, if the jury disbelieved them, "the plaintiff was entitled to the verdict." Wightman J. said[40]: "If it had appeared that the plaintiff, in defiance of warning, "would persevere in the attempt to pass, I cannot suppose that "the jury would have found a verdict in his favour. I think, "therefore, we must assume that they considered the defendants' "contradiction not satisfactory: and I am of opinion that the "case was properly left to them as to the defiance of warning"; and Lord Denman C.J. added some words.

[38] 12 Q.B. 439, 442.

[39] Ibid. 447.

[40] Ibid.

In that case, the plaintiff's horse having been injured and killed, it was held that the plaintiff was not debarred from recovering damages from the defendants in all the circumstances of the case. It should be remembered, of course, that that was a jury case, and the question for the jury was whether the plaintiff's loss was due to his own fault, or the negligence of the defendants. In my view the difficult question in the present case is to be resolved in the same way. Was Mrs. Riden the victim of her own rash action? Was her damage due solely to her own fault? Did the knowledge she had bar her from recovering against the defendants? or, Was her conduct a ground for reducing the damages she could recover?

In my judgment she was not debarred from recovering damages from the defendants. One of the remarkable features of the case is that although Mrs. Riden had travelled this route upon which she met with her accident some hours before when she entered the house, and must therefore have known how awkward and inconvenient the journey was, yet when she came to make the return journey in darkness, apart from waiting a moment or two to allow her eyes to become accustomed to the change from the lighted house to the darkness outside, she took no precautionary steps of any kind. The question of going out of the back door was apparently never considered by anybody; she asked for no torch; she sought no companion; she betrayed no nervousness or fear of the journey; and she said in evidence that she thought the route was safe for her to travel. The words that she employed about that were quite clear when she was asked expressly about what she considered of the way, and she thought the way was quite safe.

Eliminating, therefore, from consideration, as I do, the question of the back door, on the express finding of the judge, I think that there was only one way out from the front door that night, and that was the way the plaintiff went. It is true that she was not absolutely forced to go home that night, but the owner of the horse in *Clayards* v. *Dethick*[41] was not absolutely forced to bring his horse out of the stable when the trench was in the private road. But if Mrs. Riden was to go home that night, and it was eminently reasonable that she should want to do so, the only way that she could go was by the route she did go, and which had been recommended to her; and I am not prepared to say that because she did so she is completely barred from any remedy.

[41] 12 Q.B. 439.

Hallett J., having decided that there was no duty on the defendants, and that the plaintiff failed in her action, was therefore not concerned with the question of contributory negligence. But it is to be noticed that he expressed the view that Mrs. Riden contributed very largely indeed to her own accident, because she took no precautions of any kind, when she had some knowledge of the route she was about to travel, which she had gained from travelling the route some hours before. In my judgment the defendants owed a duty to Mrs. Riden, they failed in their duty towards her and she is entitled to recover; but as she herself was guilty of contributory negligence in taking no reasonable care for her own safety, she must bear a proportion of the blame.

I agree with the view that the plaintiff and the defendants should be found equally to blame, and I agree with the figures given by my Lord in his judgment. I would therefore be in favour of allowing the appeal to the extent indicated.

ROXBURGH J. Unfortunately, I feel bound to differ. The house in question had two means of entrance and exit—a front and a back door. The back door was apparently in working order, though it was locked at night at 5 o'clock. This was the evidence of Mrs. Privett, whom the judge accepted as a truthful witness. She, as tenant and housekeeper, would be more likely to know about the back door than the plaintiff, and the judge seems to have been under a misapprehension when he said: "Ever since "the Privetts had gone to live in the top floor, this had been "kept locked up and no use was made of it at all." I should have expected Mrs. Privett to let the aged plaintiff out by the back door rather than let her jump down about 3 feet in the dark in proximity to an open area.

If the defendant contractor had put up a sufficiently illuminated notice on the path reading "Front entrance closed, entrance by "back door," he would, in my view, have discharged his whole duty to persons visiting the premises. I mention this to indicate my opinion that he was not bound to supply a safe alternative approach to the front door or to give any warning notice to a visitor who, having once entered, was coming out again. This is, I think, because no warning need be given to a person of full age who has become acquainted with the facts which constitute the danger. But the defendant contractor gave no warning. On the contrary, he created a condition of affairs as a result of which (with encouragement from his men) Mrs. Privett and others deviated from the path to follow a route which would have been almost impracticable, but for the fact that he had removed the railings which would have barred it at the front door end.

Now, I agree that if the defendant contractor ought to have foreseen that a lady 71 years of age might attempt this route in the dark (involving as it did a climb of about 3 feet in some proximity to an unfenced area) and, having successfully negotiated it, might retrace her steps on the return journey instead of asking to be let out by the back door, then the defendant owed some duty to the plaintiff. It is, therefore, necessary to probe the question whether such a thing was reasonably to be contemplated in advance, and, if it was, the further question what was the extent of the duty owed. It is on these two questions that I have the misfortune to be in a minority.

It has been proved that the defendant's men encouraged Mrs. Privett in the use of this alternative way. But Mrs. Privett, whose age is not in evidence, may have been more agile than the plaintiff and—a more important consideration—the encouragement was given for journeys in daylight. It was not, I think, reasonably to be contemplated that Mrs. Privett would pass on this encouragement to a visitor aged 71 arriving in the dark, when there was an alternative approach by the back door. Again, the defendant by doing something which he ought not to have done, that is, leaving the top steps unfenced, made possible the deviation which led to disaster. But I do not think that he could reasonably have expected that this action, which may even have been intended to facilitate deviation by the housekeeper and her husband, would result in a visitor at night being recommended to follow, and following, the same course. Therefore, I am unable to agree that the defendant ought reasonably to have foreseen that the plaintiff might follow the course which she took in the dark.

But if I am wrong in this, then the question arises: what was the extent of the duty of the defendant contractor to the plaintiff on her return journey? For a significant fact, if the route was as difficult and dangerous as it appears to have been, is that she had no misgivings about retracing her steps, still without a light. I have a strong feeling that the route was not dangerous to anybody taking reasonable care while in the state in which the defendant's men left it and that the danger was created when a Mr. Brown, unknown to the defendant, placed a board, which became slippery, and on which the plaintiff slipped and was then carried forward by the onward momentum resulting from her jump into the area about 8 feet away from the ramp.

C. A.
1956

Riden
v.
A. C.
Billings &
Sons Ltd.

Roxburgh J.

But I should not feel justified in giving effect to that feeling in view of the findings of the judge, and I proceed upon the footing that the way was dangerous when the defendant's men left and that the danger was not created by Mr. Brown. Upon that footing the defendant contractor had a clear duty to warn visitors ignorant of the facts constituting the danger. If the area was dangerous, he should have given warning of that. But he could not give warning of the board because he knew nothing about it. But on the return journey the plaintiff knew more than the defendant contractor knew. She knew not only of the area but also of the board. What, then, was his duty to her? In my view, none.

In *Kimber* v. *Gas Light and Coke Co. Ltd.*[42] (a decision of this court) the visitor did not know of, and was not warned of, the existence of a hole in the landing opened by some contractors. It was not, therefore, necessary to decide what the position would have been if the plaintiff had known. But in order to decide the case it was necessary to explore the extent of the duty in a situation otherwise similar.

Pickford L.J. said[43]: "it was negligence any longer to leave "the hole unfenced and without warning." Bankes L.J. said[44]: "In my opinion, the rule of law applicable to that case and to "the present is at least as wide as this, namely: If a person "creates a dangerous condition of things (something in the nature "of a concealed trap), whether in a public highway, or on his "own premises, or on those of another, and he sees some other "person who to his knowledge is unaware of the existence of the "danger lawfully exposing himself or about to expose himself to "the danger which he has created, he is under a duty to give such "person a warning." Scrutton L.J. said[45]: "It is A's duty to "carry on his work with due precautions for the safety of those "whom he knows, or ought reasonably to know, may be lawfully "in the vicinity of his work; and the most obvious precaution "would be to warn B, who is going towards a hidden danger A "has created."

Now, I do not suggest that a warning will always be all that is required from a contractor creating a danger; this must always be a question of fact and degree. But if a warning is all that is required in the case of an approaching visitor, nothing could be required in the case of a departing visitor who knew all—indeed, more than all—the contractor knew about the facts constituting the danger.

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[42] [1918] 1 K.B. 439.
[43] Ibid. 444.
[44] Ibid. 445.
[45] Ibid. 447.

The question, therefore, is whether more than a warning was required in the present case.

A submission by counsel that the duty of a contractor to give warning is necessarily limited to dangers "on the premises" (whatever exactly that may mean) does not appeal to me. But, of course, the place where the danger is situate is very relevant in considering what the contractor ought to do. The area here concerned was on neighbouring land. The contractor had no right to fence it, and I do not think that he had any duty to ask permission to do so. Nor do I think that he had any duty to erect a complete fence along the boundary between the path and the front door or even to stop up the deviation by erecting or replacing a barrier along the line of the steps. In my view the contractor's duty was only to warn any person who did not know all the facts which he knew, and the plaintiff was not such a person.

It is said that this question of knowledge has been transferred by changes in the law of contributory negligence from the sphere of duty to the sphere of apportionment of blame.

In *Slater* v. *Clay Cross Co. Ltd.*[46] the plaintiff was walking through a narrow tunnel on the defendants' narrow gauge railway. Instructions had been given to drivers that they were to blow the whistle and slow down, but on the occasion of the accident, owing to exceptional circumstances, this was not done. The plaintiff was clearly entitled to succeed because, though she knew of the danger arising when the train travelled in its usual manner, she did not know the facts which on the particular occasion made her passage more than usually dangerous. She was faced with an unusual danger or trap in ignorance of the facts. If, therefore, there is any difficulty about the case, it arises only from certain passages in the judgment of Denning L.J., which seem to me to go beyond what was necessary for its decision.

He said[47]: "It seems to me that when this lady walked in "the tunnel, although it may be said that she voluntarily took "the risk of danger from the running of the railway in the "ordinary and accustomed way, nevertheless she did not take the "risk of negligence by the driver. Her knowledge of the danger "is a factor in contributory negligence, but is not a bar to the "action"; and then, after leaving out some words: "Where "knowledge of the danger is not such as to render the accident

[46] [1956] 2 Q.B. 264.

[47] Ibid. 271.

C. A.

1956

RIDEN
v.
A. C.
BILLINGS &
SONS LTD.

Roxburgh J.

" solely the fault of the injured party, then it is not a bar to the " action but only a ground for reducing the damages."

I respectfully suggest that these passages go too far. I agree that such knowledge as that plaintiff had was no bar to that action, if only because she did not know the facts which constituted the special danger, and I also agree that knowledge is by no means always a bar to an action. But I am unable to believe that knowledge of the facts has ceased to be a bar when the only breach of duty is a failure to give warning of the facts constituting the unusual danger. Surely there can be no duty to tell anybody something he already knows, and if there is no breach of duty, there is no cause of action. A change in the law of contributory negligence cannot, as it seems to me, create a cause of action where none existed before, and this seems to be the conclusion to be drawn from two recent decisions in this court and one in the House of Lords.

In a case in this court as recent as 1953 (*Hawkins* v. *Coulsdon and Purley Urban District Council*[48]) Somervell L.J. said: " The " duty of a licensor is to warn licensees of any unusual or con- " cealed danger of which he knows, which would not be obvious " to a reasonably careful person. Apart from that, the licensee " takes the premises as he finds them." Denning L.J. said[49]: " In the result it seems to me that nowadays, in the case of an " unusual danger which is not obvious or known to the visitor, it " can fairly be said that the occupier owes a duty to every person " lawfully on the premises to take reasonable care to prevent " damage."

In an even more recent case before this court (*Greene* v. *Chelsea Borough Council*[50]) Singleton L.J. observed that there was nothing to show that the plaintiff knew that the ceiling was dangerous, and Denning L.J., referring to *London Graving Dock Co.* v. *Horton*,[51] said[52]: " The majority of their Lordships " thought that if Horton chose to sue the occupiers instead of " his employers, he must be regarded, in proceedings against the " occupiers, as free to avoid the danger, and he was disentitled, " therefore, to sue them."

In the present case the plaintiff was free to act in a number of ways which would have avoided the danger.

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[48] [1954] 1 Q.B. 319, 326.

[49] Ibid. 337.

[50] [1954] 2 Q.B. 127, 137; [1954] 2 All E.R. 318.

[51] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[52] [1954] 2 Q.B. 127, 139.

C. A.
1956

Riden
v.
A. C.
Billings &
Sons Ltd.

Roxburgh J.

In *Horton's* case in 1951[53] Lord Normand said: "And in any "event there was in the present case an opportunity for inspection, both by the plaintiff's employers and by the plaintiff "himself, so that the plaintiff actually knew as the result of "his inspection the very defects of which he now complains. "*Donoghue* v. *Stevenson*[54] cannot, in my opinion, have any "application to this case."

It is true that the first two of these cases were fought between licensors and licensees and the third between an invitor and an invitee, but there is no suggestion in any of them that the effect of the alteration in the law of contributory negligence has been to enlarge the cause of action by enlarging the scope of the duty, and there seems to be no logical reason for giving that alteration an effect as between a contractor and a visitor to the premises which it has not as between licensor and licensee.

I need scarcely add that I am not considering what the law ought to be, but what it appears to me to be in accordance with previous authority.

I would dismiss this appeal.

Appeal allowed.
Leave to appeal.

Solicitors: *Syrett & Sons for Ivens, Thompson & Green, Cheltenham; Gibson & Weldon for H. D. Keith Scott, Gloucester.*

F. R. D.

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[53] [1951] A.C. 737, 757.

[54] [1932] A.C. 562.

REGINA *v.* ODHAMS PRESS LTD. AND OTHERS. *Ex parte* ATTORNEY-GENERAL.

1956
July 26;
Oct. 2, 11.

Lord Goddard C.J.,
Pilcher and
Ashworth JJ.

Contempt of Court—Mens rea—Newspaper article—Pending criminal proceedings—Article alleging criminal charges against defendant awaiting trial—Article calculated to prejudice fair trial—No knowledge by editor or reporter of pending proceedings—Whether mens rea necessary ingredient of contempt.

One of a series of articles dealing with prostitution and brothel keeping in London appearing in a Sunday newspaper alleged that one M. was engaged in the business of purveying vice and managing street women and urged his prosecution and arrest. M. had been arrested and brought before a magistrate charged with brothel keeping, and at the time when the article appeared was awaiting trial at quarter sessions. The newspaper had made arrangements with court reporters for the supply of reports of cases relating to prostitutes and brothel keeping, but in fact no information was given to the editor and reporter, and they did not know of the proceedings against M. On a motion by the Attorney-General against the newspaper proprietors, the editor and the reporter for writs of attachment for contempt, the respondents did not dispute that the article tended or was calculated to prejudice the fair trial of M., but contended that since they had no knowledge of the pending criminal proceedings they could not be held guilty of contempt:—

Held, that mens rea was not a necessary constituent of a contempt of which the court would take cognizance and punish, and that lack of intention or knowledge was only material in relation to the penalty which the court would inflict; the test was whether the matter complained of was calculated to interfere with the course of justice, not whether the authors and printers intended that result, and publication of matter charging alleged criminal offences was at the risk of those responsible for it; accordingly, each of the respondents was guilty of contempt.

Roach v. *Garvan* (1742) 2 Atk. 469; *Ex parte Jones* (1806) 13 Ves. 237; and dictum of Palles C.B. in *Rex* v. *Dolan* [1907] 2 I.R. 260, 284 applied.

Metropolitan Music Hall Co. v. *Lake* (1889) 58 L.J.Ch. 513; 5 T.L.R. 329 and *In re Marquis Townshend* (1906) 22 T.L.R. 341 distinguished.

Per curiam. A newspaper may expose and comment on someone's conduct which they believe to be fraudulent or otherwise criminal, but if they do so the comment should be made with proper restraint, taking care especially to refrain from publishing matter of which the law forbids evidence being given at the trial. It is a perilous adventure which they undertake at their own risk.

MOTIONS for writs of attachment.

One June 13, 1956, one Micallef was arrested and brought before the magistrate at Marylebone charged with brothel keeping. He was remanded until June 27 when he was committed for trial to the London Sessions which opened on July 3. His case had not been reached and he was still awaiting trial when there was published in the issue of "The People" newspaper for Sunday, July 15, an article headed "Arrest this beast," which constituted an attack on Micallef and alleged that he was engaged in the business of purveying vice and managing street women. For some time the newspaper had been publishing a series of articles prepared by Duncan Webb, a reporter employed by them, dealing with prostitution and brothel keeping in London and making a particular attack on the Messina brothers, who were denounced as notorious brothel keepers, and this article alleged that Micallef, who was related to the Messina brothers, had openly boasted that he was the private secretary and accountant of the Messina gang. A photograph of Micallef was displayed in the article and his arrest and prosecution were urged.

The Attorney-General moved for writs of attachment against Odhams Press Ltd., the printers and publishers of "The People," Harry Ainsworth, the editor, and Duncan Webb, the reporter, for their several contempts in publishing or causing to be published the article.

At the hearing the respondents did not dispute that the article tended or was calculated to prejudice the criminal proceedings against Micallef, and expressed their sincere regrets and apologies to the court. They denied, however, that they had had any knowledge of the pending proceedings, and evidence was given on affidavit with regard to arrangements which they had made with court reporters at Marylebone and Marlborough Street police courts for the supply of reports of cases relating to prostitutes and brothels, and especially those relating to the activities of the Messinas.

The hearing was adjourned for instructions to be taken on the affidavits filed for the respondents, and when the hearing was resumed on October 2 a number of deponents were cross-examined. At the conclusion of the evidence the Attorney-General accepted that neither Webb nor the editor knew of the proceedings pending against Micaleff.

Further facts are stated in the judgment.

Sir Reginald Manningham-Buller Q.C., A.-G., Rodger Winn and *Aubrey Warshaw* in support of the motion. The effect of the article must have been to poison the minds of its readers against Micallef. Wills J. in *Rex* v. *Parke*[1] said that "it is "possible very effectually to poison the fountain of justice before "it begins to flow," and had Micallef been arrested immediately after the publication of the article its contents might well have prejudiced his trial. In fact, when the article was published Micallef had already been arrested and committed for trial, and the publication of the article was calculated to prejudice his trial and to interfere with the due course of the administration of the criminal law and therefore constituted a grave contempt of court: see *Regina* v. *Evening Standard Co. Ltd.*[2] and the

[1] [1903] 2 K.B. 432, 438; 19 T.L.R. 627.

[2] [1954] 1 Q.B. 578; [1954] 1 All E.R. 1026.

passages from the judgment of Lord Hardwicke L.C. in *Roach* v. *Garvan*[3] cited therein.[4] Ignorance of the fact that Micallef was about to be tried on charges relating to the premises named in the article is no excuse, for it does not alter the fact that the effect of the article must be to interfere with the administration of justice. Those who make it their business to publish such matter should make sure that they are not publishing it about a person awaiting trial. While it is accepted that the respondents did not know of the pending proceedings against Micallef, had they made the slightest inquiries they would have been informed, and it is submitted that in the circumstances they ought to have known.

Gerald Gardiner Q.C. and *Hugh Davidson* for the respondents. It is admitted that the article was likely to prejudice the trial of Micallef and the respondents desire to express to the court their sincere regret for its publication at a time when proceedings were pending. Where there is comment on a matter in respect of which proceedings are pending the question whether or not it is a contempt of court depends upon whether the comment would prejudice the trial, and that is for the court and not the author to decide; but publication of comment when there are proceedings pending cannot amount to contempt of court unless there was knowledge of the pending proceedings, or a deliberate shutting of their eyes, on the part of those responsible for the publication: see *Metropolitan Music Hall Co.* v. *Lake*[5] and *In re Marquis Townshend.*[6] Not only did the respondents not know of the proceedings against Micallef, but they had reasonable grounds for thinking that he had not been charged. It is reasonable to take the view that if proceedings are not taken against someone known to be committing criminal offences the attention of the public should be drawn to it. Nothing had happened which should have led to the respondents knowing that Micallef had been charged. Failure to make inquiries was no more than negligence, and contempt of court cannot be committed by negligence. *Regina* v. *Evening Standard Co. Ltd.*[7] should be distinguished, for in that case it was known by all concerned that criminal proceedings were pending.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. The proposition that there can be no contempt unless there was knowledge of the pending proceedings is not accepted. Reliance is placed on *Regina* v. *Evening Standard Co. Ltd.*,[7] where there was a completely innocent contempt by the reporter. Before publishing an article of this kind there is a duty to take proper care and to make sure that proceedings are not pending; if no inquiries are made it is not enough for those responsible to establish that they did not in fact know; if that were not so, it would mean that there would be a multiplicity of such articles, for reporters and editors need not bother to make inquiries. The test is whether or not what was published was clearly intended, or at least calculated, to prejudice a pending trial: see the speech of Lord Russell C.J. in *Regina* v. *Payne*.[8] The respondents appreciated that, if a trial were pending, this article would be highly prejudicial; a trial was in fact pending, though without their knowledge, and the publication was accordingly sufficient to constitute contempt.

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[3] (1742) 2 Atk. 469.

[4] [1954] 1 Q.B. 578, 584.

[5] (1889) 58 L.J.Ch. 513.

[6] (1906) 22 T.L.R. 341.

[7] [1954] 1 Q.B. 578.

Cur. adv. vult.

October 11. LORD GODDARD C.J. read the following judgment of the court: In this matter the Attorney-General moves for writs of attachment against Odhams Press Ltd. as the printers and publishers of "The People" newspaper, against Harry Ainsworth, the editor, and Duncan Webb, a reporter employed by the company, for their several contempts in publishing or causing to be published in the issue of the newspaper for Sunday, July 15, 1956, an article which tended or was calculated to prejudice criminal proceedings against one Anthony Micallef, who had been committed for trial at the London Sessions. It appears that for some time the newspaper had been publishing a series of articles prepared by the respondent Webb dealing with prostitution and brothel keeping in London. A particular attack was made in those articles on some persons named as the Messina brothers who were denounced, it may be perfectly correctly, as notorious brothel keepers and protectors of prostitutes. One at least of these men had been convicted of living upon immoral earnings. The article in the issue of July 15 constituted an attack on Micallef, who is in some way related to the Messinas. It was headed in banner headlines "Arrest this beast," and a photograph of Micallef was displayed in the article. It was alleged that he was up to his eyes in the foul business of purveying vice and managing street women, and that he openly boasted that he was the private secretary and accountant of the Messina gang.

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[7] [1954] 1 Q.B. 578.

[8] [1896] 1 Q.B. 577, 580; 12 T.L.R. 321.

It is unnecessary to further quote from the article, but it is not disputed that it both tended and was calculated to prejudice criminal proceedings against Micallef which were, in fact, pending at the time of publication. He had been arrested on June 13 and brought before the magistrate at Marylebone on that day charged with brothel keeping. He was remanded till June 27 when he was committed for trial to the London Sessions, which opened on July 3, although his case had not been reached by the time the article was published.

With the truth or falsity of the various allegations in the article this court is not concerned, for it is not and could not be disputed that anything more calculated to prejudice a fair trial could not well be imagined, and considering that the proprietors claim a circulation of over four million copies a week, there is a strong probability that it would be read by at least some of those summoned as jurors to the sessions. The respondent Webb's answer to the motion is that he had no knowledge that a charge had been preferred against Micallef. It is certainly remarkable that a man describing himself as an experienced crime reporter and investigator, who had been publishing these articles for some weeks, should not have known that one of the men he was so actively pursuing had not only been arrested and charged but actually committed for trial. He had sent down to interview Micallef while he was on bail another reporter, one Peter Grisewood, who describes himself as a free-lance journalist, but who not infrequently worked for "The People." The purpose of this interview was never made clear to the court, but it was said that much of the material published in the article was based on what Micallef told Grisewood at this interview. While again it is unnecessary for the purposes of these proceedings to decide on the truth or falsity of Grisewood's evidence, we find his affidavits and the evidence he gave when cross-examined by the Attorney-General most unsatisfactory and in some respects frankly incredible. Webb's case as to his lack of knowledge may be summarized by saying that the company paid the court reporters at both Marylebone and Marlborough Street courts to supply them with reports of cases relating to prostitutes and brothels, and especially to those relating to the activities of the Messinas. There was a considerable conflict of evidence as to the nature of these instructions or lack of instruction, but it is accepted by the Attorney-General that no information was in fact given to Webb of the proceedings against Micallef and, as in the opinion of the court the question as to how far Webb or the publishers of the newspaper took proper steps to keep themselves informed of the chance or probability of proceedings being taken is not a material or decisive question in the case except as to penalty, we need not investigate the evidence on this point in detail. The Attorney-General accepts that Webb did not know that the charge had been made, and if he did not it follows that the editor did not, as he simply relied on Webb.

We have then to deal with the submission made on behalf of the respondents by Mr. Gardiner, that unless there was knowledge there can be no contempt. This can be summarized by saying that the contention is that mens rea is a necessary constituent of the offence. While this is at first sight an attractive argument as we are dealing with a criminal contempt which exposes the offender to a fine or imprisonment, in our opinion a review of the cases shows that persons who publish matter of this description charging alleged offences against the criminal law do so at the risk of not only being sued for libel but also of being punished for contempt if the criminal law has been set in motion. And the same is true if civil proceedings have been started, at least if they are of a common law nature and may be heard before a jury. In this regard we may call attention to what was said by Maugham J. in *In re William Thomas Shipping Co. Ltd.*[1] as to the different way that the common law courts and the Chancery courts approach these matters because of the presence of juries in the former.

The first case to which we would refer is *Roach* v. *Garvan*,[2] generally cited as the *St. James's Evening Post* case. The judgment of Lord Hardwicke L.C. in that case has always been regarded as the locus classicus on this subject. The publication with which he was dealing was said to be both a libel and a contempt of court, and the Lord Chancellor refused to deal with it as a libel, as that was not a ground for interference by a court of equity, but he did hold it to be a contempt. The publisher was a Mrs. Read, on whose behalf it was urged that she did not know the nature of the offending article, but Lord Hardwicke said[3] that it was urged "that she did not know the "nature of the paper; and that printing papers and pamphlets, "is a trade, and what she gets her livelihood by. But, though "it is true, this is a trade, yet they must take care to do it "with prudence and caution; for if they print any thing that "is libellous, it is no excuse, to say, that the printer had no

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[1] [1930] 2 Ch. 368, 373.

[2] (1742) 2 Atk. 469.

[3] Ibid. 472.

"knowledge of the contents, and was entirely ignorant of its being "libellous; and so is the rule at law, and I will always adhere "to the strict rules of law in these cases. Therefore Mrs. Read "must be committed to the Fleet, according to the common "order of the court upon contempts." This case was considered by Lord Erskine L.C. in *Ex parte Jones*.[4] Here, again, a libel on individuals was held also to be a contempt. After citing *Roach* v. *Garvan*,[5] Lord Erskine L.C. said[6]: "As to the printers, as "Lord Hardwicke observes, it is no excuse, that the printer was "ignorant of the contents. Their intention may have been "innocent: but, as Lord Mansfield has said, the fact, whence "the illegal motive is inferred, must be traversed; and the party, "admitting the act, cannot deny the motive. The maxim "'actus non facit reum, nisi mens sit rea' cannot be made "applicable to this subject in the ordinary administration of "justice; as the effect would be, that the ends of justice would "be defeated by contrivance." These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and, in our opinion, they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognizance and punish.

The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame. It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to intend to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which in fact is calculated to prejudice a fair trial. We would refer to the emphatic statement of the law by a judge of great eminence whose judgments are always received in this country with the highest respect, Palles C.B. In *Rex* v. *Dolan*,[7] having posed the question whether a speech the subject of the motion would have a tendency to prejudice the fair trial of an indictment, the Chief Baron said[8]: "As to "the law applicable to the case, there is no doubt. Actual "intention to prejudice is immaterial. I wholly deny that the

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[4] (1806) 13 Ves. 237
[5] 2 Atk. 469.
[6] 13 Ves. 237, 239
[7] [1907] 2 I.R. 260.
[8] Ibid. 284.

"law of this court has been that absence of an actual intention "to prejudice is to excuse the party from being adjudged guilty "of contempt of court, if the court arrives at the conclusion "which I have arrived at, that there is a real danger that it will "affect the trial: or that absence of intention is to excuse the "party from punishment. Such a circumstance as that ought, "no doubt, to be taken into consideration in considering the "nature of the punishment to be awarded, as, for instance, "whether it should be imprisonment." Again this seems to dispose of any suggestion that mens rea, which means a guilty intention, is in any way material except as to penalty. The article in question in the present case urged the arrest and prosecution of Micallef. It proceeded to give in a sensational manner details of his relationship with persons of bad character, some of whom had been convicted in this country for offences connected with prostitution, and to refer to Micallef's previous convictions, the number of which incidentally appears to have been exaggerated tenfold.

Reporters and editors of newspapers know perfectly well that evidence relating to these matters cannot be given at a trial, yet they are being published broadcast so that persons who may have to sit as jurors may be informed beforehand of the bad characters of the persons they have to try. In this respect we would refer to *Rex* v. *Parke*,[9] where the court said[10]: "It is "possible very effectually to poison the fountain of justice before "it begins to flow." We do not mean to say that a newspaper may not expose and comment on someone's conduct which they believe to be fraudulent or otherwise criminal, but if they do, the comment should be made with proper restraint, taking care especially to refrain from publishing matter of which the law forbids evidence being given at the trial. It is a perilous adventure which they undertake at their own risk, and a clear warning to this effect was given in 1924 by this court. In *Rex* v. *Evening Standard, Manchester Guardian and Daily Express*[11] Lord Hewart C.J. said[12]: "It was clear that some of these "newspapers, as was shown by the materials before the court, "had entered deliberately and systematically on a course which "was described by some of them as 'criminal investigation.' It "was urged on behalf of one respondent on the previous day "that it was part of the duty of a newspaper when a criminal

[9] [1903] 2 K.B. 432; 19 T.L.R. 627.

[10] [1903] 2 K.B. 432, 438.

[11] (1924) 40 T.L.R. 833.

[12] Ibid. 835.

1956

REGINA
v.
ODHAMS
PRESS LTD.

"case was pending to elucidate the facts. If he understood "that suggestion when clearly expressed it came to something "like this; that while the police or the Criminal Investigation "Department were to pursue their investigations in silence and "with all reticence and reserve, being careful to say nothing to "prejudice the trial of the case, whether from the point of view "of the prosecution or the point of view of the defence, it had "come to be somehow for some reason the duty of newspapers to "employ an independent staff of amateur detectives, who would "bring to an ignorance of the law of evidence a complete "disregard of the interests whether of the prosecution or the "defence. They were to conduct their investigation unfettered, "to publish to the whole world from time to time the results of "these investigations, whether they conceived them to be "successful or unsuccessful results, and by so doing to perform "what was represented as a duty, and, one could not help "thinking, to cater for the public appetite for sensational "matter."

We must now deal with the two cases of the *Metropolitan Music Hall Co.* v. *Lake*[13] and *In re Marquis Townshend*,[14] on which Mr. Gardiner relied as establishing that knowledge was an essential ingredient in the offence of contempt. It is to be observed that in neither of these cases did the court consider that the matter complained of was sufficiently serious to call for action. It is true that in the first case Chitty J. did deal at some length with the question of lack of knowledge of pending proceedings, and showed that he would be reluctant to impose punishment where a lack of knowledge was proved to the satisfaction of the court. The other case was one of a very special character and arose out of certain proceedings in lunacy. One set of these proceedings had terminated, but on the day before the publication complained of a petition under section 116 of the Lunacy Act, 1890, for the appointment of a receiver had been presented, and of those proceedings the author of the article could have had no knowledge. It is clear that the court was mainly influenced by the fact that there was nothing in the article showing that it referred to any pending proceedings or contained any comment on any pending matter. It is true that Collins M.R. did stress the question of knowledge or lack of knowledge as a constituent of the offence; Romer L.J. made no reference to this. We cannot consider either of these cases as qualifying the two decisions of *Roach* v. *Garvan*[15] and *Ex parte Jones*[16]; and the subsequent decision of this court in the case of the three newspapers[17] to which we have just referred shows that in matters of the description with which we are now dealing and which urge the prosecution of an alleged criminal, the publication is at the risk of those responsible for it. Accordingly, we hold that the respondents and each of them are guilty of contempt.

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[13] (1889) 58 L.J.Ch. 513; 5 T.L.R. 329.

[14] (1906) 22 T.L.R. 341.

It remains to deal with the penalty. The court cannot look on this as otherwise than a serious offence. This was an article written in a highly sensational manner published in what the respondent Webb described as a sensational paper. Obviously a matter such as this is published with a view to increasing circulation and with no other object. We shall therefore order the company to pay to the Crown a fine of £1,000 within seven days or appropriate writs will issue. With regard to the editor, the court can only regret the attitude he took when in the witness-box. He seemed to think this was no concern of his, and that he was entitled to rely on his reporter without more. It has always been a tradition of English journalism that the editor takes responsibility for what is published in his paper, and this was held to be a rule of law in *Regina* v. *Evening Standard Co. Ltd.*[18] As it is accepted that neither he nor the respondent Webb had actual knowledge of the pending proceedings, grave as is this case, the court will not impose a sentence of imprisonment. It was urged for Webb that he had taken all reasonable precautions before publication, but, in our opinion, the evidence fell far short of showing that standard of care which persons indulging in this kind of journalism are bound to take. Accordingly, a substantial fine must be imposed on both these respondents. The order in their case will be that leave to issue writs of attachment against both of these respondents is granted, but the writs are not to be enforced if within seven days each respondent pays a fine of £500. The respondents will pay the costs of these proceedings.

Sir Reginald Manningham-Buller Q.C., A.-G. When this article was published, the solicitors acting for Micallef started to consider taking proceedings, and as the court has indicated in the past that when proceedings in this court are taken it is

[15] 2 Atk. 469.

[16] 13 Ves. 237.

[17] 40 T.L.R. 833.

[18] [1954] 1 Q.B. 578, 585; [1954] 1 All E.R. 1026.

1956

REGINA
v.
ODHAMS
PRESS LTD.

desirable that they should be taken by a law officer, the matter was taken over. Would the court think it right to say that, subject to taxation, the costs incurred by Micallef should be added to the costs which the respondents should pay?

LORD GODDARD C.J. Yes; he was entitled to move, and so far as that is concerned, he is entitled to the costs.

Orders accordingly.

Solicitors: *Director of Public Prosecutions; Simmonds & Simmonds.*

J. F. L.

1956
June 21,
22, 25.

Lord Goddard C.J., Ormerod and Donovan JJ.

B. P. REFINERY (KENT) LTD. *v.* KENT RIVER BOARD.

SAME *v.* LOWER MEDWAY INTERNAL DRAINAGE BOARD.

Rates and Rating—Drainage rate—When annual value "determined"—Rate based on Schedule A assessment signed and allowed by commissioners—Appeal against assessment pending—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 29*—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 35, 41.
Revenue—Income tax—Schedule A.

On March 28, 1955, a drainage board, before levying a drainage rate for the year ending March 31, 1956, on a company owning and occupying premises partly within the board's district, applied under section 29 (4) of the Land Drainage Act, 1930,[1] to the inspector of taxes for particulars of the Schedule A assessment on the company. On April 29, 1955, the inspector having informed the board that a revised assessment on the company for the year ending April 5, 1955, signed and allowed by the additional commissioners amounted to £1,140,000, the board notified the company that they had adopted that figure as the annual value for the purposes of the drainage rate and had apportioned some £700,000 of it as the annual value of the part of the premises within its district. On May 11, 1955, the company was notified by the inspector of taxes of the assessment, against which the company promptly gave notice of appeal. On June 24, 1955, the board, treating the annual value as nevertheless "determined" within section 29 (1) of the Act of 1930, levied a rate on the company on that basis:—

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[1] Land Drainage Act, 1930, s. 29: "(1) In this Part of this Act— . . . The "expression 'annual value' in relation to any land means the gross "annual value of that land as determined for the purposes of income "tax under Schedule A of the Income Tax Act, 1918, as amended "by any subsequent enactment. "(2) Any apportionment of the gross "annual value of any land which "may be necessary for the purpose "of determining the annual value of "any land for the purposes of drainage rates shall be made by the "drainage board, and, where any "land is not assessed for the purposes of income tax under "Schedule A of the Income Tax Act, "1918, as amended by any subsequent enactment, the annual value "thereof for the purposes of drainage "rates shall be such value as may "be determined by the drainage "board. (3) Where under the last "preceding subsection a drainage "board have made any apportionment or have determined any value, "they shall serve notice of their "decision upon both the owner and the "occupier of the hereditament to "which the decision relates, and the

Held, that in deciding whether or not the annual value had been "determined" within section 29 of the Act of 1930 regard must be had to the Income Tax Act, 1952; that under the latter Act when the additional commissioners signed and allowed the assessments, the annual value was merely estimated or assessed and that would stand good unless there was an appeal; that the annual value was not "determined" until the time limit for appeal had expired without any appeal being lodged, or, if there was an appeal, that appeal was decided by the general commissioners; accordingly, in the present case, the annual value had not been determined for the purposes of income tax and, therefore, not determined under section 29 of the Act of 1930; and so, the rate was not validly made.

Cases stated under the Quarter Sessions Act, 1849, s. 11.

On June 24, 1955, the respondents, the Kent River Board, acting as drainage authority for the internal drainage district for certain parts of Kent, made or purported to make in respect of the year ending March 31, 1956, drainage rates to be assessed and levied on the owners and occupiers of hereditaments in the board's district, which hereditaments included land and premises occupied by the appellants, the Kent Oil Refinery, Ltd. (now known as B. P. Refinery (Kent) Ltd.). The company, being aggrieved by those rates, appealed to quarter sessions, and afterwards by consent of the parties and by order of Devlin J. made on July 26, 1955, the following special case was stated:—

"owner and the occupier, or either "of them, may within 28 days after "the service of the notice, appeal "against the apportionment or determination to a court of summary "jurisdiction, whose decision shall be "final. (4) A drainage board may "from time to time require the surveyors of taxes for their district to "furnish to them . . . a copy of the "annual values for the time being in "force for the purposes of income "tax under Schedule A of the Income Tax Act, 1918, as amended "by any subsequent enactment, for "all or any of the properties in that "district."

1. (i) The appellants are the owners and occupiers of certain land and premises (hereinafter called "the premises") on the Isle of Grain in the county of Kent which premises are and were at all material times assessable for the purposes of income tax under the schedule referred to as Schedule A to the Income Tax Act, 1952 (hereinafter called "the Act of 1952"), part of which lies within the internal drainage district for which the respondents are the drainage board within the meaning and for the purposes of the Land Drainage Act, 1930 (hereinafter called "the Act of 1930"), and part of which lies outside such district. Upon the premises the appellants have been and still are constructing an oil refinery. Such construction was planned to take place in four phases, each phase being of an installation capable of being brought into operation as soon as it was complete. Phase I was completed and brought into operation during the year ending April 5, 1953. Phases II and III were completed and brought into operation during the years ending April 5, 1954 and 1955, respectively.

(ii) The gross annual value of the premises as determined for the purposes of income tax under Schedule A to the Act of 1952 for the year ending April 5, 1954, was £148,588. This related only to phase I of the construction.

(iii) Such value was, for the year ending March 31, 1955, apportioned by the respondents, pursuant to the provisions of the Act of 1930, for the purpose of determining the annual value of that part of the premises lying within the aforesaid internal drainage district, so that the annual value of the part for drainage rates under the Act was £62,700.

(iv) The respondents duly made a drainage rate for the year ending March 31, 1955, based upon such annual value and the appellants paid the drainage rate assessed on the basis of such annual value as apportioned.

(v) On March 23, 1955, the Additional Commissioners of Income Tax signed and allowed under section 35 and/or section 41 of the Act of 1952 an assessment of the premises under Schedule A for the year 1954–1955 ending April 5, 1955, at a gross annual value of £1,140,004. This related to phases I, II and III of the construction.

(vi) By a letter dated April 7, 1955, Her Majesty's inspector of taxes for the respondents' district, in reply to requests by the clerk to the respondent board (acting as agent for and on behalf of the board and of the Lower Medway Internal Drainage Board) for information as to the Schedule A assessment of the premises, furnished to the clerk the revised Schedule A assessments signed and allowed on March 23, 1955, which included ' Part Oil Refinery and Premises—£1,140,004.''

(vii) By a notice of assessment dated May 11, 1955, the appellants were given notice of the assessment.

(viii) The appellants duly gave notice of appeal against such assessment on May 16, 1955, and such appeal is still pending.

(ix) By a notice of apportionment dated April 29, 1955, the respondents gave notice to the appellants that they had apportioned the gross annual value for purposes of income tax Schedule A of the premises (namely, £1,140,004) so that the annual value for drainage rating purposes of the part of the premises lying within the internal drainage district had been determined to be £703,150. The figure of £703,150 is entered in the respondents' drainage rate book in respect of the drainage rate for the year ending March 31, 1956, under the heading "Gross Annual Value of Property for Income Tax Purposes "(Schedule A) or as apportioned or determined by the Board."

(x) On June 24, 1955, the respondents made or purported to make drainage rates pursuant to the provisions of the Act of 1930 in respect of the hereditaments in the internal drainage district for the year ending March 31, 1956, namely, an owner's rate of 8d. in the £ and an occupier's rate of 1d. in the £.

(xi) All formal requirements as to the making or purported making of the rates and of the apportionment were duly complied with by the respondents.

(xii) On July 4, 1955, the appellants gave due notice of appeal against the drainage rates pursuant to the provisions of section 30 of the Act of 1930.

2. The questions for the opinion of this court are:—

(i) Whether that part of the premises lying within the internal drainage district has any annual value for the purposes of the Land Drainage Act, 1930.

(ii) Whether, if the answer to the last question is in the affirmative, such annual value is the amount of the apportionment made by the respondents of the sum of £1,140,004 referred to in paragraph 1 (v) of this case or is the amount of the apportionment made by the respondents of the sum of £148,588 referred to in paragraph 1 (ii) of this case. It is agreed between the parties that the amounts of the apportionments are correctly computed in relation to the sums of £1,140,004 and £148,588 respectively.

(iii) Whether the rate made by the respondents as set out in paragraph 1 (x) of this case is validly made under the Act of 1930.

(iv) Whether, if so, the appellants are liable to pay rates on the basis of the annual value as apportioned by the respondents by their notice of apportionment dated April 29, 1955, or on the basis of the annual value as apportioned by the respondents for the purposes of drainage rates for the year ended March 31, 1955, or on some other (and if so what) basis.

A case in similar terms was stated in regard to the levying of a drainage rate by the Lower Medway Internal Drainage Board on the appellant company in respect of that part of the land and premises occupied by the company within that board's district. The two cases were heard together.

Michael Rowe Q.C. and *R. J. Parker* for the appellant company. The issue is whether, the Schedule A assessment on the company having been made, the annual value is "determined" for the purpose of the Income Tax Act, 1952, if signed and allowed by the commissioners, although it is the subject of a pending appeal. The appellants say that the annual value is not in force while the appeal is pending.

Under section 30 of the Land Drainage Act, 1930, which is concerned with appeals against rates, there is no provision under subsection (3), under which the court may confirm, annul or modify the rate, for the repayment of any sum overpaid. The reason is that until quarter sessions have determined the appeal there is no power to collect the rate.

By section 50 (1) of the Income Tax Act, 1952, the commissioners may not alter any assessment before the time for hearing and determining an appeal, and then only in accordance with their determination. It is clear, therefore, that the assessment is not "determined" until after the appeal which, by subsection (2), once it is determined is final. [Reference was also made to section 53.] An assessment is also determined if an appeal is settled by agreement: see section 510 of the Act of 1952.

The wording of the Land Drainage Act, 1930, suggests that a drainage rate is not recoverable until an assessment has been determined. It is not possible to say that the annual value has been determined unless there is a value which is effective, and here there has been no income tax determination. A rate levied prior to determination is invalid and ultra vires. Until the determination of the appeal the board could only continue to levy rates at the previous valuation. So far as the appellant company is concerned, the answer to question (iii) of the case concludes the matter. The company submits that the rate made by the boards was not validly made and should be struck out.

Sir Andrew Clark Q.C. and *Patrick Browne* for the boards. The case turns on the construction of the Act of 1930. It is a badly drafted Act and one must look at the purpose of the Act to obtain a sensible construction. The word "shall" in section 24 (1) shows that a drainage board is a mandatory body with statutory duties to raise the rate in accordance with the Act. The section further shows that the rate is to be levied on all occupiers of hereditaments within the district on the basis of the annual value of those hereditaments. The subsequent provisions of the Act must be construed so as to ensure that the preceding provisions are carried out. "Determined" in section 29 (1) means as fixed or assessed for the purposes of the Act of 1930; it is synonymous with "assessed." Once the land is assessed the annual value is determined for the purposes of Schedule A. The expression is not *finally* determined. By subsection (2) it is clear that the scheme of the Act is that either the annual value is determined for the purpose of income tax or it is fixed by the board. In the ordinary way the annual value is ascertained or determined when it is entered by the general commissioners, and it is effective immediately it is signed and allowed, albeit that there is a right of appeal. It is submitted that the annual value has been "determined," although not necessarily finally.

The question is, has it been ascertained for the purposes of the Act of 1952? If the rate has been changed there is a right of recovery of overpayment. The boards must be able to make an assessment on the annual value, because an appeal may take a year before being heard and it is essential that the rate be recovered in the meantime. The Act contemplated that the board would levy a rate on the assessment and make any adjustments later. From section 24 of the Act of 1930 it is clear that once the position is accepted that somehow the rate must be levied, the board must be able to ascertain what the annual value is. The term "determined" means ascertain for the purpose of making an assessment.

[Donovan J. An assessment is only an estimate.]

No, for if there is no appeal and the assessment is only an estimate there is no machinery for arriving at the annual value.

If there is a successful appeal the board can always amend the rate under section 28.

The Act of 1930 must be construed broadly and be given an acceptable construction which does not do violence to the Act. The board cannot discharge the duty of levying a rate to meet its expenses unless it can at any given time ascertain what is the annual value. Reading the Act as a whole, it is clear that it is framed so as to provide that that can be done. The annual value as defined in section 29 (1) is not within the knowledge of the board, who can only obtain a figure fixed by the surveyor of taxes and act upon it. The Act requires that a board shall base their rate on the annual value "as determined" and, by section 29 (4), "for the time being in force." These two requirements are synonymous. All that has to be determined is whether the annual value is assessed on the land for the purposes of income tax, if it is, that annual value is the annual value within the Act of 1930. It is the annual value contained in any valid subsisting assessment.

In the Income Tax Act, 1952, s. 82 (2), proviso, "determined" must mean determined by the additional commissioners. Likewise in section 84 (1).

[Donovan J. What is the earliest moment when this annual value is determined?]

When it is signed and allowed by the additional commissioners under section 35.

[Donovan J. But notice has not been given to the taxpayer.]

At least it is common ground that the assessment of the company's premises of £1,140,004 was made and entered in the inspector's books. It is clear from section 51 (1) of the Act of 1952 that signing and allowing constitutes an "assessment" within that Act, and that it is that assessment which fixes the annual value follows from section 51 (2). The moment an assessment is made the rate may be levied. The assessment by the commissioners is effective and in force immediately it is signed, and tax is due and payable the day after: see section 72 (1).

Section 52 (5) must be read in conjunction with section 50 (1). The present assessment was the one in force which determined the annual value. Admittedly it was not a final determination, but the Act of 1952 does not require it to be final. The determination is final when it is adopted under section 84 (3). In *Rex* v. *Income Tax Special Commissioners, Ex parte Elmhurst* [2] the nature of proceedings before the commissioners was considered, but the case only decided that a notice of appeal, once given, could not be withdrawn by the taxpayer without the permission of the commissioners; but, whether or not an appeal is subsequently lodged, at the time the commissioners sign and allow the assessment the annual value is "determined" and tax becomes payable although some of it may become repayable on appeal. If the annual value is not determined when the assessment is signed and allowed it cannot become so by mere lapse of time; therefore, if signing and allowing is not a determination, and there is no appeal, there never is a determination. It follows that there must be a determination until the assessment is set aside by an appeal.

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[2] [1936] 1 K.B. 487; 52 T.L.R. 143.

[Donovan J. I should have thought that if an appeal was not made within 21 days the assessment was determined.]

"Determined" means determined within the meaning of the Act of 1930, and is synonymous with the annual value contained in an assessment for the time being in force. In *Louth Drainage Board* v. *Carey*[3] the Divisional Court held that, the surveyor of taxes having produced a list showing the assessment of the ratepayers' land, that assessment was conclusive and the board was entitled to issue summonses for non-payment of rates based on that assessment. In *Commissioner of Sewers* v. *Cheffings*,[4] in which the facts were substantially the same as in the present case, the court held that the rate there made was valid since it had been made on the annual value at that time existing, and that it was none the less valid because the owner of the land in question had appealed to the inspector of taxes against the Schedule A assessment and that assessment had been reduced.

If signing and allowing is not a determination, then there never can be a determination. The rate was validly made and should be upheld.

Cur. adv. vult.

June 25. Lord Goddard C.J. The judgment of the court will be delivered by Donovan J.

Donovan J. read the following judgment. These two appeals, which come before the court under the Quarter Sessions Act, 1849 (Baines's Act), and are in the form of agreed special cases, concern the validity of drainage rates made by the respondents upon the appellants for the year ended March 31, 1956. The

[3] (1941) 85 S.J. 233.

[4] (1935) 23 R. & I.T. 52.

issues are the same in each case, and it will, therefore, be sufficient to deal with the appeal of the Kent Oil Refinery Ltd. (now known as B. P. Refinery (Kent) Ltd.) against the rate levied by the Kent River Board.

The respondents (whom I will call "the board") are a drainage board for the purposes of the Land Drainage Act, 1930. The appellants (whom I will call "the company") are erecting a refinery within the board's drainage district, and bringing it into operation by stages. The board are entitled by section 24 of the Act of 1930 to levy rates on owners or occupiers of hereditaments within their district, and by subsections (3) and (4) of section 24 the rate has to be assessed on the basis of the annual value of the hereditament, and to be a uniform rate of so much per £ throughout the area. By section 29 (1) the expression "annual value" is defined to mean the gross annual value of the land as determined for the purposes of income tax under Schedule A of the Income Tax Act, 1918, as amended by any subsequent enactment. As is well known, the Income Tax Act, 1952, has replaced the Income Tax Act, 1918, and the intervening Finance Acts, as the current consolidating measure. To enable a drainage board to obtain information about such annual values, section 29 (4) of the Act of 1930 provides that surveyors of taxes shall on request supply "a copy of the annual "values for the time being in force for the purposes of income "tax under Schedule A . . ."

The gross annual value of the company's refinery, so far as then completed, for the income tax year ending April 5, 1954, for the purposes of Schedule A was £148,000 odd, and the board levied a drainage rate on an apportioned part of that figure for the board's year ending March 31, 1955. The apportionment was necessary because part of the hereditament lay outside the board's district. No question arises upon this, the preceding year.

On March 28, 1955, the board was apparently considering what rate it should levy for its next year, namely, that ending on March 31, 1956; and on March 28, 1955, it wrote to the inspector of taxes asking for particulars of the Schedule A assessments on the company. He replied on April 7, 1955, saying that "revised" Schedule A assessments were "signed and allowed" on March 23, 1955, and set out, inter alia, the figure of £1,140,000 with which alone we need be concerned. Though not so stated in the inspector's letter, this was an income tax assessment for the year 1954–1955. Three weeks later, namely, on April 29, 1955, the board gave notice to the company showing that the

1956

B. P. Refinery (Kent) Ltd. *v.* Kent River Board. Same *v.* Lower Medway Internal Drainage Board.

board had adopted the figure of £1,140,000 as the annual value, for the purposes of the drainage rate, for the year ending March 31, 1956, and had apportioned some £700,000 of it as the annual value of that part of the refinery within the board's district.

At this stage, so far as the case discloses, the company had never even heard of the figure of £1,140,000 as being a Schedule A assessment upon them. They did not get notice of it until May 11, and they thereupon, on May 16, appealed against the assessment. The annual value for Schedule A purposes for the income tax year 1954–1955 then became a matter of dispute between the company and the Revenue, and is still unresolved. On June 24, 1955, however, the board, treating that annual value as " determined " within the meaning of section 29 (1) of the Act of 1930, levied a rate on the company on that basis. On July 4 the company appealed to quarter sessions.

The point now is whether the board were right in regarding the annual value of the company's hereditament for the year 1954–1955 as " determined " for the purposes of Schedule A in the foregoing circumstances. The same point was glanced at, but not decided, by a Divisional Court in an unreported case in 1935: *Commissioners of Sewers* v. *Cheffings.*[1] It was not the issue in the case, and the respondent was unrepresented.

At first blush one may perhaps be forgiven for thinking that an annual value could hardly be determined for the purposes of income tax when in fact it is in dispute between the income tax authorities and the taxpayer: for one meaning of the word " determined " is " to ascertain precisely." This, indeed, is the argument for the company, reinforced by considerations based on a number of sections in the Income Tax Act, 1952. But the board say that the annual value is " determined " for the purposes of Schedule A at the moment the assessment is laid before the additional commissioners pursuant to section 34 of the Income Tax Act, 1952, and they " sign and allow " it under section 35. And the board, too, rely upon various sections of the Income Tax Act, 1952, from a short consideration of which, therefore, there is no escape. The board add that unless they are right they will never know just what rates they have to levy because appeals against Schedule A assessments may in some cases be lodged up to one year after the end of the year of assessment; they may take a long time to be disposed of, and meantime the board, if the company is right, will have no money, and therefore be unable to discharge their statutory duties under the Drainage Act, 1930. Accordingly, while stigmatizing that Act as loosely and even badly drafted, they ask that the expression "determined for the purposes of Schedule A" be given a broad interpretation in their favour.

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[1] (1935) 23 R. & I.T. 52.

Dealing at once with this question of prospective administrative difficulty, it is, of course, entirely legitimate to take it into account on a question of construction, such as this. But it is, with all respect, an exaggeration to say that the board's interpretation is vital to a performance of their duties. Under section 46 of the Act of 1930 they have power, with the Minister of Agriculture's consent, to pay their expenses for the time being out of borrowings, and while no doubt they would wish to avoid this, the existence of the power is inconsistent with the argument that the board's work must come to a standstill unless their interpretation of section 29 is correct. One has also to remember that the bulk of Schedule A assessments are fixed in a year of revaluation, and remain in force for five years. It will, no doubt, be administratively inconvenient if the board have to wait in order to see whether a Schedule A assessment is going to be appealed against before levying a rate. But when the Land Drainage Act, 1930, was passed the period was only 21 days. The extension of the time limit for appeal under Schedule A came in 1942. And while noticing the apprehension of the board that they may have to wait in a particular case until the House of Lords gives a decision, we do not share it. There is obvious force in an argument that a decision of commissioners on appeal holds the field as a determination until reversed. The grievance here may, indeed, be the ratepayer's, who may pay his drainage rate on the basis of such a determination, and not be able to get back any excess rate he will have paid if that determination is reversed in his favour. For the Drainage Act, 1930, contains no provision allowing such repayment—a circumstance relied on by the company as support for its argument. There is, therefore, no such strength in the plea of administrative difficulty as would justify a strained and unnatural interpretation of the word "determined" in section 29 (1). One may come to that problem without being unduly oppressed by the prospect of disaster should the company's interpretation be right.

The general contention of the company has already been indicated. It also argues, as we have just said, that the absence of any right to recover rates paid on annual values which turn out to be excessive, shows that the legislature did not intend rates to be levied on annual values which were in dispute. In reply the board faintly relied on section 28 of the Act of 1930; but this merely allows them to amend a rate, not repay part of the proceeds of a rate if the relevant annual value is afterwards reduced for income tax purposes. For the rest—apart from a comparison based upon the Rating Acts, into which it is mercifully unnecessary to go—the company's case consisted of meeting in advance arguments it expected the board to use.

Nothing will be lost, however, if one goes straight to the board's actual arguments, which in summary, and apart from prophesies of a stoppage of work, were these: first, "determined" in section 29 (1) means determined for the purposes of or within the meaning of the Land Drainage Act, 1930, not the Income Tax Act, 1952; second, so far as the Income Tax Act, 1952, is concerned, the annual value is "determined" once the additional commissioners sign and allow the assessments pursuant to section 35 or section 41 of that Act; third, the circumstances that the taxpayer may dispute the assessment and give notice of appeal so that the dispute may be resolved makes no difference at all.

As regards the first contention, the court does not quite follow it. The ultimate purpose of finding out what annual value has been determined for income tax purposes is, of course, to enable the drainage rate to be fixed. But this does not seem to help very much on the present question of construction, which is: what is "the gross annual value of [the] land as determined for the "purposes of income tax under Schedule A"? Obviously to answer that question one must find out what constitutes such a determination under the relevant provisions of the Income Tax Acts. If all that the first contention of the board means is that one should not lose sight of the ultimate purpose of the inquiry, we agree with it; and it may be that the contention is simply another facet of the argument already noted, that the court should, if it can, give a broad construction to the word "determined" lest otherwise the board may be prevented from doing its work.

The second argument is based on section 34 and section 35 of the Income Tax Act, 1952. Section 34 requires the assessor to deliver to the additional commissioners, inter alia, his certificate of assessment under Schedule A; and under section 35 the additional commissioners, if satisfied with the assessments, are to "sign and allow" them. The office of assessor has now been abolished, and the surveyor (now the inspector) of taxes

1956

B. P. Refinery (Kent) Ltd. v. Kent River Board. Same v. Lower Medway Internal Drainage Board.

substituted: see section 15 of the Act of 1952. There may or may not be additional commissioners for any district: see section 6 (2) and the First Schedule to the Act, paragraph 5 (6) of which makes it clear that when there are no additional commissioners appointed the general commissioners are to do all the work.

The board places such stress on the words "sign and allow" in section 35 that it is useful to see just what has happened up to this point. Notices to make a return, inter alia, of annual value will normally have been given to the taxpayer: see section 20 and also section 24. The usual notice is contained on the front of every income tax return. If no return is made pursuant to the notice, or if the commissioners are not satisfied with the return, the assessor may, under the commissioners' order, make a survey of the land with the help of a person of skill in order to ascertain the annual value for himself: see section 33. If, however, the taxpayer's return is acceptable, the assessor makes his "assessment." Just what this operation consists of the Act seems to leave to the imagination. Presumably the assessor (now the inspector) makes out and certifies lists showing opposite each person's name the amount of declared income—assuming the declaration to be acceptable—and it may well be that these lists so made out and certified are regarded as "the assessment," and the "certificate of assessment." These lists and certificates are now probably all in the form of bound books.

The additional commissioners, or if there are none, the general commissioners, then consider these assessments and, if satisfied, "sign and allow" them. This does not mean that in all cases the commissioners' duty of ascertaining the true annual value is at an end so that "signing and allowing" an assessment may be treated as the determination of annual value. For one reason or another the assessment may be simply the commissioners' own estimate of the annual value and the taxpayer may not, when it comes to his knowledge, agree with it at all, and may wish to challenge it. If he does, the Act gives him a right of appeal. In the circumstances it seems a little bold to say that nevertheless the annual value has now been "determined," and an outside body like the board may proceed to levy their drainage taxation straight away on the basis of a figure of annual value which may turn out to be wholly erroneous. When his appeal is heard by the general commissioners the taxpayer may want an entirely fresh valuation to be made by a person of skill, and if he does the commissioners must allow it.

They themselves may want the same thing, and if they do the taxpayer cannot prevent it. Any such valuation will, under the Act, be conclusive: see section 53.

This court and the Court of Appeal had occasion in *Rex* v. *Income Tax Special Commissioners, Ex parte Elmhirst*[2] to consider the nature of proceedings by commissioners designed to arrive at a true figure of the taxpayer's income. The case concerned surtax, but as Lord Wright M.R. said,[3] the general principles apply to any form of income tax. Lord Hewart C.J.,[4] giving the decision in the Divisional Court, adopted what had been said by Greer L.J. in the earlier case of *Sneath* v. *Commissioners of Inland Revenue*,[5] namely: " . . . the estimating " authorities, even when an appeal is made to them, are not " acting as judges deciding litigation between the subject and " the Crown. They are merely in the position of valuers whose " proceedings are regulated by statute to enable them to make " an estimate of the income of the taxpayer for the particular " year." Lord Wright M.R., in the Court of Appeal, after examining all the relevant sections, comes to the same conclusion, and ends his judgment thus[6]: " . . . the machinery " of these sections shows that in such a case [where a notice " of appeal has been given] the commissioners have the " power and the duty of examining all the facts, and that " such power is given to them by the mere giving of the notice " of appeal. Having a duty to examine the facts, they are bound " to give effect to what appears to them to be the proper " assessment to be made in view of those facts."

That, therefore, is the duty of the commissioners in the present case where notice of appeal has also been given, and what the board is really contending is that the process of ascertaining " the proper assessment " can be treated for their purpose as completed almost at the very beginning. They justify this by contending that the " signing and allowing " of the assessment by the additional commissioners has such effects that it is proper to regard the annual value as determined at this stage, even though an appeal is subsequently lodged.

The principal effect that the board assert is that the tax becomes payable there and then, despite any appeal, though any excess may be refunded if the appeal is successful. We do not agree that this correctly states the legal position under the

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[2] [1936] 1 K.B. 487.

[3] Ibid. 493.

[4] Ibid. 488.

[5] [1932] 2 K.B. 362, 385.

[6] [1936] 1 K.B. 487, 501.

1956

B. P. Refinery (Kent) Ltd. v. Kent River Board. Same v. Lower Medway Internal Drainage Board.

Income Tax Act, 1952. We think it is true to say that there is no provision expressly deferring liability to pay until the conclusion of an appeal. But one would hardly expect it. If, in any dispute with the Revenue, the taxpayer had always to assume that he was wrong, and the Revenue right, and therefore pay up until the contrary were proved, one would expect that situation to be reflected in some express enactment, rather than the reverse, and it certainly is not. The taxpayer and the Revenue have lived together now for about a century and a half under the impression that, except where expressly enacted otherwise, tax which is in dispute becomes payable only when the dispute is resolved in the Revenue's favour by the commissioners when they decide on appeal. That this is correct seems quite clear from those sections which do enact otherwise in certain particular cases: see, for example, section 63 (2) and section 64 (10) of the Act, which need not be read or summarized, but which are clearly inconsistent with the existence of a general liability to pay tax once assessments are signed and allowed.

Sir Andrew Clark, for the board, referred to section 72 (1) of the Income Tax Act, 1952, which provides, inter alia, that where an assessment for any year is signed and allowed on or after January 1 (which is the present case) the tax shall be due and payable the day after the assessment is signed and allowed. The section cannot, however, be read in isolation. In fact it begins with the words "Subject to the provisions of this Act." These provisions include those already specified as showing what the position is when tax is in dispute.

Section 51 may also usefully be looked at in this connexion. It is the section conferring rights of appeal, and after specifying 21 days as the time limit for giving notice of appeal, it proceeds: "Provided that where the assessment is under Schedule A or "Schedule B and the appellant has not been served with a notice "of the assessment—(*a*) the time within which notice of appeal "may be given shall be any time before the expiration of twelve "months from the end of the year of assessment; but (*b*) nothing "in this proviso shall affect the collection or recovery of any tax "assessed or charged, but where the assessment is reduced upon "appeal any tax overpaid shall be repaid." Proviso (*b*) thus operates only where the appellant has not been served with a notice of assessment. It is an obvious inference that where he has been so served, the collection and recovery of tax is not to be enforced pending the hearing of his appeal. In other words, there is no general liability to pay once the assessment is signed and allowed. If there were, then proviso (*b*) would be quite unnecessary. In the present case the company was in fact served with a notice of assessment. A similar conclusion is reached by a consideration of paragraph 2 (*a*) of Part II of the Fifth Schedule dealing with years of revaluation.

The present assessment on the company is almost certainly an additional assessment within the meaning of section 41 of the Income Tax Act, 1952, being made almost at the end of the year of assessment to which it relates. " Additional " for this purpose simply means additional to the first assessments which are made at the beginning of the fiscal year. This explains the references to section 41 in paragraph 1 (v) of the case. It is therefore interesting to note that section 41 (1) (i) (*b*) says that the additional commissioners are to sign and allow an additional first assessment " which shall be subject to appeal and other proceed-" ings as in the case of a first assessment." This language certainly does not support the idea of a " determination " of annual value at the time of signing and allowing the assessment.

Sir Andrew then referred to section 84 of the Income Tax Act, 1952, which deals with the quinquennial valuation. It requires that the annual values of all properties chargeable under Schedule A " shall be determined afresh " for each fifth succeeding year of assessment; and the proviso to subsection (3), after giving a right of appeal, says that the commissioners may amend or confirm the assessment as required, as if the annual value so to be taken, i.e., as the result of the appeal " were the annual " value determined for that year as it would have been but for " the provisions of this section."

An argument is based on these last words, which I understand to be this. But for the appeal the annual value would have been " determined " without any appeal. Therefore, " determination " of annual value " cannot mean determination after appeal. But nobody suggests that there cannot be a determination of annual value unless there is an appeal first. As already indicated, if the annual value is fixed by the commissioners upon the basis of the taxpayer's own return and he does not appeal, there is no reason why this should not be described as a determination once the time limit for appealing has expired. The question here is: what is the position when the commissioners and the taxpayer are in dispute over the figure upon which the commissioners have assessed him? At what stage is the annual value then determined? Upon these questions section 84 (3) affords no real help.

Finally Sir Andrew asks: if the annual value is not determined when the assessments are signed and allowed by the additional commissioners, when is it determined? We would answer, when the time limit for appeal has expired without any appeal being lodged; or, if there is an appeal, when that appeal is decided by the general commissioners. It is objected for the board at this stage that the time limit for appeals is two years, and Parliament cannot have intended the board to be without rates for two years. That is obviously true; but in 1930 when the Land Drainage Act was passed, the time limit for appeals was 21 days only: see section 136 of the Income Tax Act, 1918. In 1942, however, probably as a measure of wartime economy, the legislature abolished the necessity imposed by section 134 of the Act of 1918 to give notice of assessment under Schedule A to taxpayers, and by way of compensation extended the right of appeal to 12 months after the end of the year of assessment in any case where a notice of assessment under Schedule A had not in fact been given: see the Finance Act, 1942, 10th Schedule, paragraph 6, now reproduced in section 51 (3) of the Income Tax Act, 1952. Unfortunately, when this was done in 1942 no one seems to have given a thought to the position of Drainage Boards under the Act of 1930—in particular under section 29 (1). Clearly some amending legislation is now required to deal with the new situation, e.g., to allow Drainage Boards to do in all cases what they can now do only in some, i.e., fix the annual value themselves. The remedy is not, however, for the courts to put an interpretation upon the Act of 1930 which it will not reasonably bear.

We turn to see whether the company's rival contention as to what " determined " means receives positive support from the Income Tax Acts, and we think it does. When the pending appeal goes before the commissioners, either they, or the appellants, may require the annual value to be estimated by a person of skill, and such a valuation will be conclusive: see *Lyons* v. *Collins*.[7] The result of this operation is described by section 53 of the Income Tax Act, 1952, in these terms: " The annual value " shall be determined in accordance with that valuation." Then, if the appellant, having required the appointment of a person of skill, is guilty of delay, subsection (2) provides that " the commis- " sioners shall determine the annual value according to the best " of their judgment." So that either way the decision of the commissioners on appeal is described as a determination of the

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[7] [1937] 1 K.B. 353; 53 T.L.R. 140; [1936] 3 All E.R. 788.

1956

B. P. Refinery (Kent) Ltd. *v.* Kent River Board. Same *v.* Lower Medway Internal Drainage Board.

annual value. This would be odd language to use if the annual value had already been determined the moment the assessments had been "signed and allowed" by the additional commissioners under section 35 or section 41. The use of the word "determined" in section 53 shows, we think, this: that when the additional commissioners sign and allow the assessments under Schedule A the annual value is then estimated or assessed, and that will stand good unless there is an appeal; but that where there is an appeal the annual value will be "determined" when the appeal is heard. And this is the same word as is used in section 29 of the Act of 1930.

Sir Andrew was asked in the course of argument what would happen if the board were first told of an existing assessment, and then, before they made their rate were told that it had been increased on appeal. Which figure would the board take as being the annual value "as determined" for the purposes of Schedule A? Not unexpectedly he said the increased figure, thus involving the proposition, from which he did not shrink, that in respect of the same property for the same year there can be two different determinations of annual value by the commissioners. We do not think such a situation is contemplated by section 29 (1) of the Act of 1930.

Both sides sought support for their views from the language of section 29 (4) which gives the drainage board the right to ask the surveyor of taxes for a copy of the annual values "in force" for the time being under Schedule A. The words "in force" would seem to be intended to mean the same as "determined" in section 29 (1). If so, what we have already said covers the issue. If it means something other than "determined" it is not the point we have to resolve, and is merely another illustration of the loose drafting of the Act of 1930. "In force" is obviously an ambiguous expression. It may mean the annual value fixed by an assessment which has become final and conclusive, which is the company's argument, or an assessment "in force" in the sense that it is one that has just been brought into being, though this seems less likely. But either way, one still has to get back to the problem of what "determined" means under section 29.

In our opinion where, as in this case, a Schedule A assessment is under appeal, so that the annual value is in dispute, it cannot be said that the annual value has been determined for the purposes of Schedule A of the Income Tax Act, 1952, and the case

1956

B. P. Refinery (Kent) Ltd. v. Kent River Board. Same v. Lower Medway Internal Drainage Board.

will go back to quarter sessions to proceed upon the basis of that opinion.

The board wishes to keep open as a subsidiary point that upon that footing they may make their own estimate of annual value pursuant to section 29 (2) of the Act of 1930. That provides, inter alia, that where any land is not assessed to income tax under Schedule A the drainage board may itself determine the annual value. The answer is that the land here in question has been assessed to Schedule A, and none the less so because the statute should in strictness have used the word "charged." It is a person who is assessed, not land. There are some lands which are not charged under Schedule A, viz., quarries, mines, ironworks, and so on, to which section 29 (2) will apply.

The relevant question put to us in the special cases is this: "Whether the rate made by the respondents as set out in "paragraph 1 (ix) of the case is validly made under the Act of "1930." We answer it by saying that to the extent that it proceeds on the basis that the annual value of the hereditament has been determined for the purposes of Schedule A for the relevant year it is not validly made. The remaining questions seem not to arise.

Appeal allowed.

Cases remitted to quarter sessions with direction to enter judgment for the company with costs, and to modify rate by striking out the annual value as entered therein in relation to the hereditament.

Solicitors: *Linklaters & Paines; Kennedy, Genese & Lyson for A. G. Stirk, Maidstone.*

J. D. P.

REGINA *v.* TOTTENHAM AND DISTRICT RENT TRIBUNAL. *Ex parte* NORTHFIELD (HIGHGATE) LTD.

1956
June 29.

Lord Goddard C.J., Ormerod and Donovan JJ.

Landlord and Tenant—Rent tribunal—Furnished premises—Assignee's reference — Whether assignee party to the contract — Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).

The assignees of a lease of a furnished flat referred the contract of tenancy to a rent tribunal. On a motion by the landlords for an order of prohibition:—

Held, that an assignee of a lease was not a "party to the "contract" within section 2 (1) of the Furnished Houses (Rent Control) Act, 1946, and, therefore, the tribunal had no jurisdiction to hear the reference.

APPLICATION for prohibition.

The applicants, Northfield (Highgate) Ltd., were the owners of premises known as Highpoint, Highgate. By a lease dated March 14, 1949, the applicants granted a tenancy of flat No. 54 of the premises to Iris Gertrude Oram for a term of seven years from March 25, 1949, at an annual rent of £650 per annum. By reason of a decision of the rent tribunal given on August 4, 1950, reducing the rent of two other flats in the premises, the applicants voluntarily reduced Mrs. Oram's rent to £528 per annum (and the rent of certain other flats) so that the same was in conformity with the tribunal's decision. By a deed of assignment dated March 4, 1954, Mrs. Oram, with the consent of the applicant company, assigned the residue of her leasehold interest to Jose Salviche and Barbara Salviche (his wife). On February 7, 1956, following a refusal by the applicants to grant them a new lease an application was made by Jose and Barbara Salviche to the rent tribunal to consider the rent of the flat. The applicants asked for an order of prohibition directed to the tribunal to prohibit them from entertaining the application on the ground that neither Jose nor Barbara Salviche was a "party to the "contract" within the meaning of section 2 (1) of the Furnished Houses (Rent Control) Act, 1946,[1] and therefore a person entitled to apply to the tribunal under the Act and that the tribunal had no jurisdiction or authority to hear or determine the application.

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[1] Furnished Houses (Rent Control) Act, 1946, s. 2 (1): "Where a con- "tract has, whether before or after "the passing of this Act, been "entered into whereby one person "(hereinafter referred to as the "'lessor') grants to another person "(hereinafter referred to as the "'lessee') the right to occupy as a "residence a house or part of a house "situated in a district in which this "Act is in force in consideration of a "rent which includes payment for the "use of furniture or for services . . . "it shall be lawful for either party "to the contract or for the local "authority to refer the contract to the "tribunal for the district . . ."

Desmond Ackner for the applicants. There is no authority for the proposition that an assignee of a lease cannot refer the contract of tenancy to the rent tribunal, although there is an unreported decision in the Court of Appeal—*Reg.* v. *Hampstead and St. Pancras Rent Tribunal; Ex parte Perseus Property Co. Ltd.*[2]—in which a sublessee referred the subtenancy to the tribunal and it was held that the head landlords were not parties to the contract within section 2 (1) of the Act of 1946, and, therefore, were not entitled to be given notice of the application to the tribunal or an opportunity of appearing.

Section 2 (1) of the Act of 1946 refers to "lessor" and "lessee." By contrast, the Landlord and Tenant (Rent Control) Act, 1949, s. 1, refers to "landlord" and "tenant." Both Acts provide for applications to the tribunal, but the Act of 1946 refers only to a "party to the contract," whereas the Act of 1949 provides for "the landlord," which by definition includes his assigns, or the "tenant" (or his assigns), applying to the tribunal. Again, by the Furnished Houses (Rent Control) Regulations, 1946, reg. 5, the tribunal gives notice to "each party to the contract." By contrast, in the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950, reg. 2, it is provided that applications to the tribunal shall specify the name of the landlord and "any "other person . . . having an interest in the dwelling-house which "would be affected by the determination of the tribunal."

[ORMEROD J. The question is whether "either party to the "contract" includes assignee.]

Walker's case[3] shows that an assignee does not step into the lessee's shoes and the latter remains liable under the contract of tenancy. The assignee does have some protection because not only the tenant but the local authority also can refer the contract to the tribunal. If this had not been an Act concerned with penal provisions the position might have been different. In *Clift* v. *Taylor*[4] Scott L.J., speaking of the interpretation of the Landlord and Tenant Act, 1927, said that the Act interfered with the freedom of contract and thus modified an important right of the individual. This is an a fortiori case. In *London County Council* v. *Aylesbury Dairy Co. Ltd.*[5] Wright J. said that he understood the rule to be that where there was an enactment which might entail penal consequences one ought not to do violence to its language to bring people within it. In *London and North Eastern Railway Co.* v. *Berriman* [6] it was said that a man was not to be put in peril on an ambiguity. Here there was no ambiguity. The legislature intended that only the party to the contract should refer that contract to the tribunal, and the assignees here were not parties to the contract.

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[2] Judgments of the Court of Appeal, 1954, No. 191.

[3] (1587) 3 Co.Rep. 22a.

[4] [1948] 2 K.B. 394; 64 T.L.R. 346; [1948] 2 All E.R. 113.

[5] [1898] 1 Q.B. 106.

Rodger Winn for the rent tribunal. Although the tribunal wishes to take no part in the proceedings, they wish to submit that the present application is premature. The tribunal had not embarked on the hearing, and as soon as the landlord objected they adjourned. They would like some guidance on whether they should have adjourned sine die or should have proceeded to decide the matter. In *Rex* v. *London, etc., Rent Tribunal; Ex parte Honig* [7] it was held that the tribunal had jurisdiction to inquire into the existence of a tenancy.

[Lord Goddard C.J. It is not possible to lay down any general rule, but it seems that, in the present case, it was perfectly proper for the parties to come before this court.]

Apart from this general point it is submitted that the contention of counsel for the applicants is correct.

G. Avgherinos for the assignees. If the submission of the applicants is right, it not only defeats the object of the Act of 1946, but makes the later provisions quite unworkable. The contention also applies where there has been an assignment of the reversion, or an assignment by operation of law, and therefore on the death of the tenant his wife would be deprived of the benefit of the Act. Similarly, where the person in whom the reversion is vested dies, his successor would not get the benefit of the Act. By section 2 (1) there must be a contract—the words are not "has granted" but "grants"—the contract has a continuing effect.

[Lord Goddard C.J. "Grants" means "made once for "all." It is a term of art. Once the contract is made it is made for the period of the lease.]

The use of the present tense is significant. It means the persons for the time being granting and deriving the benefit from the grant. If that is right, there is no difficulty about the words "either party." Looking at the regulations of 1946, if the limited construction applies it will make nonsense of the procedure, for example, in regulation 4, if the lessor means the original lessor and he dies, what address should be put in the notice to the tribunal?

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[6] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

[7] [1951] 1 K.B. 641; [1951] 1 T.L.R. 41; [1951] 1 All E.R. 195.

[DONOVAN J. If the main enactment is clear and unambiguous one cannot refer to the machinery provisions to show something else.]

Section 2 (3) of the Act of 1946 provides that "it shall be "lawful for the lessor or the lessee . . . to refer the case to the "tribunal"; if the applicants' contention is right, then, if the lessor dies and his successor has reason for applying to the tribunal for an increase of rent, he cannot do so because he is not the original lessor. Again, in section 5, if lessor is confined to the original lessor, where there has been a transfer of the reversion the lessor can give notice to quit with impunity. [Sections 9 (2) and 12 (2) were also referred to to indicate the anomalous position that would arise if the applicants' contention was acceded to.] In section 7 of the Landlord and Tenant (Rent Control) Act, 1949, it is obvious that "landlord" and "tenant" include "assignor" and "assignee," and the section provides that, in certain circumstances, the Act of 1946 shall apply to the contract, and, therefore, "lessee" in the Act of 1946 must also include "assignee."

LORD GODDARD C.J. The only question in this case is whether an assignee of a lease is entitled to refer the lease under which he or she holds to the rent tribunal, and that entirely depends on the wording of the Furnished Houses (Rent Control) Act, 1946.

In spite of the gallant efforts of Mr. Avgherinos, I am bound to say that I think this case is quite unarguable. Parliament might have included assignees as persons entitled to refer a lease; it may be that it would be desirable that they should, I do not know. The only question is whether Parliament has done it. [His Lordship read section 2 (1) of the Act of 1946 and continued:] That subsection defines the persons who are lessors and lessees, that is to say, the lessor is the person who grants a lease and the lessee is the grantee of the lease, and this is the only Act among the Rent Acts, so far as I know, which uses the expression "lessor" and "lessee" and not "landlord" and "tenant." It is also the only section in all this rent restriction legislation which uses the expression "It shall "be lawful for either party to the contract." Parliament is always presumed to know the law and to be legislating with regard to the condition of the law as it exists at the time when the legislation is passed; and it has been the common law in this country for hundreds of years that there is a distinction between an assignee and a lessee, so that although there is privity of estate between the lessor and assignee, there is no privity of contract. It is therefore impossible to read the word "lessee" which, apparently, has been deliberately used, because it is used throughout the Act and the regulations, as meaning "assignee." If Parliament had intended the word "lessee" to include an assignee, it could have said so.

This point receives emphasis from observing the provisions of the Landlord and Tenant (Rent Control) Act, 1949, which enables unfurnished houses to be referred to the tribunal for the purpose of considering the standard rent, and in that Act the words are not "lessor" and "lessee," but "landlord" and "tenant." Then in section 18, the definition section, it is provided that expressions have the same meanings as in the principal Acts. That is not in the Act of 1946, and on referring back to section 12 (1) (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, one finds: "The expressions 'landlord,' "'tenant,' 'mortgagee,' and 'mortgagor' include any person "from time to time deriving title under the original landlord, "tenant, mortgagee, or mortgagor." Even there, the words "lessor" and "lessee" are not used. It is impossible for this court, because an Act, for instance, which deals with the reference to the tribunal of unfurnished houses, use the expressions "land-"lord" and "tenant," to say that we can lift the section containing those expressions and put it into the Act of 1946. The fact is that whether by design or by mischance Parliament has not dealt with the case of an assignee. Therefore, there is no power, in my opinion, for an assignee of premises which are furnished houses within the purview of the Act of 1946 to refer the contract to the tribunal. Therefore, the order of prohibition must go.

There is only one other word I need add. Mr. Winn, who appears for the tribunal, has taken no part in the argument except to express a view, as amicus curiae, that it would be difficult to say that the grounds on which Mr. Ackner moved were wrong. But Mr. Winn asked us to express some opinion whether it was right for the applicants to apply to this court for prohibition or whether they ought not to have gone to the tribunal and taken the point there. Of course, they could have taken the point before the tribunal, and if the tribunal had decided in their favour, well and good. If the tribunal had decided contrary to their contention, then they would have had to come here and, instead of asking for prohibition, asked for certiorari; but I think it would be impossible and not at all desirable to lay down any definite rule as to when a person is to go to the tribunal or come here for prohibition where the objection is that the tribunal has no jurisdiction. Where one gets a perfectly simple, short and neat question of law as we have in the present case, it seems to me that it is quite convenient, and certainly within the power of the applicants, to come here for prohibition. That does not mean that if the tribunal, during the time leave has been given to move for prohibition and the hearing of the motion, like to continue the hearing they cannot do so; of course, if prohibition goes it will stop them from giving any decision, and if prohibition does not go they can give their decision. For myself, I would say that where there is a clear question of law not depending upon particular facts—because there is no fact in dispute in this case—there is no reason why the applicants should not come direct to this court for prohibition rather than wait to see if the decision goes against them, in which case they would have to move for certiorari. For these reasons, I think that prohibition must go.

Ormerod J. I agree, for the same reasons.

Donovan J. I agree. I find no difficulty about construing the expression " party to a contract "; it connotes the person who makes the offer and the person who accepts it. The argument that it includes reversioners and assignees as well, in the case of a contract for a lease, depends on a very artificial construction of section 2 of the Act of 1946. It is said that the word " grants " must be read as indicating a continuous process during which the identity of the grantor and the grantee may change, and each in turn may thus be regarded as parties to the contract. That, I think, puts a very forced and unnatural interpretation on the words " either party to the contract " which are the crucial words of section 2.

We were also pressed with the odd consequences which it is said will follow the applicants' construction. That may be so. There may be no good reason for confining the benefit of the Act to the original parties to the contract; but the Act will operate as between those parties while they both exist; and furthermore, an assignee has protection under the Act in that a local authority can, if it thinks fit, refer the contract to the tribunal. That being so, and the Act being in part a penal one, and one interfering with the common law freedom of contract, I find no compelling reason to put an artificial construction on section 2. I think that the words "either party to the contract" must be given their ordinary, natural meaning, which will exclude an assignee of a lease. One is reinforced in this conclusion by the fact to which the Lord Chief Justice has referred—that apparently none of the other Acts dealing with this subject use the expression "party to a contract."

Lastly, Mr. Avgherinos referred to section 7 of the Act of 1949. That refers to a "tenant" and a "landlord" and provides that in certain circumstances the Act of 1946 shall apply to the contract. I appreciate the force of the argument he places on that section, but a subsequent statute may be used to construe an earlier one only if it resolves some ambiguity in the earlier one, and I find no such ambiguity in section 2 of the Act of 1946. Section 7 of the Act of 1949 is not empty of content if the Act of 1946 is regarded as applicable only to the parties to the contract and no one else. For those reasons I concur in the judgment proposed.

Order of prohibition.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Agar-Hutton & Co.; Solicitor, Ministry of Health.*

J. D. P.

ROLAND-LINIE SCHIFFAHRT G.m.b.H. *v.* SPILLERS LTD. AND OTHERS.

1956
July 5, 6, 27.
Sellers J.

[1955 R. No. 754.]

Shipping — Charterparty — Demurrage — Time waiting for berth — "If . . . discharging place . . . not immediately available, demurrage in respect of all time waiting thereafter shall be paid"— Congestion in only dock — Ship not allowed to enter port — Dock authorities' order that ship should anchor at customary waiting place 22 miles outside port—Customary waiting place not within legal, geographical or fiscal limits of port—Ship not an "arrived" ship for purposes of time for discharge — Demurrage payable in respect of time spent at customary waiting place.

The plaintiffs' steamship *Werrastein*, of 6,737 tons gross, was chartered to load a cargo of wheat in bulk at Sydney, New South

1956

Roland-Linie Schiffahrt G.m.b.H. v. Spillers Ltd.

Wales. By clause 2 of the charterparty the vessel was to "proceed ". . . to discharge at . . . one safe port on the East Coast of "Britain [Hull] . . and there deliver the cargo in accordance "with the custom of port for steamships . . . at any customary "dock, wharf or pier as ordered by the charterers or their agents ". . . Provided always that if such discharging place is not "immediately available, demurrage in respect of all time waiting "thereafter shall be paid . . ." Clause 17 provided for the payment of demurrage "should the vessel not be discharged at the rate "herein stipulated" and by clause 22: "The time for discharging "at destination shall be in accordance with the custom of the port "for steamships at the port of discharge."

At the time when the charterparty was entered into and at all material times thereafter the only place where grain could be discharged at Hull was at the King George Dock, so that the charterers had no option as to the dock, although they could, and eventually did, order the vessel to a particular berth. When the *Werrastein* reached the Humber there was congestion in the King George Dock, and all the berths were occupied. Had there been no congestion she could have waited in the dock, but no position there was available to her and she was not allowed to enter. A vessel of her size could not have safely anchored, nor would she have been allowed to lie, in the Humber in the vicinity of the docks, and on the instructions of the dock authorities she was ordered to, and anchored at, Spurn Head, about 22 miles from the port of Hull, where she waited a week. The anchorage off Spurn Head, although not within the geographical, legal and fiscal limits of the port of Hull, was one of three customary waiting places for large vessels to anchor whilst awaiting entry to the docks, and which were adjuncts to and recognized facilities of the port. The shipowners claimed demurrage under the charterparty in respect of the time spent waiting at the anchorage off Spurn Head:—

Held, that the proviso to clause 2 of the charterparty gave a right to compensation (distinct from any right to demurrage after lay days had commenced to run) when a vessel was kept waiting because a discharging place was not immediately available, so that any loss due to such waiting fell upon the cargo owners. Different considerations applied to a vessel which had to wait from those which applied to a vessel which had to load or discharge, and, although the time for discharging could not have commenced to run while the vessel was at the anchorage so that she was not an arrived ship for the purposes of clause 22, the circumstances of the case were just those for which clause 2 provided, for the vessel had, in the course of her voyage to Hull, reached the recognized waiting place and, being ready to discharge, had had to wait there, not for the tide or a tug, or because of damage or breakdown on the part of the vessel, but because a discharging place was not available, and, having reached that waiting place, she could do no more than be ready and available to discharge. Accordingly, it was immaterial that the anchorage where the vessel was waiting was not within the port of Hull and demurrage was payable under clause 2.

North River Freighters Ltd. v. *H.E. President of India* [1956] 1 Q.B. 333; [1956] 1 All E.R. 50 applied.

ACTION.

By a charterparty dated September 10, 1954, between Norddeutscher Lloyd, of Bremen, as disponent owners of the s.s. *Werrastein*, of 6,737 gross register tons, and the Australian Wheat Board, as charterers, it was agreed that the vessel would load a part cargo of wheat in bulk at Sydney, New South Wales, and, by clause 2, "Being so loaded, the vessel shall proceed ". . . to discharge at . . . one safe port on the East Coast of "Britain . . . or so near thereunto as the vessel can safely get, "always afloat, and there deliver the cargo, in accordance with "the custom of port for steamships as provided for by clause 22, "at any customary dock, wharf or pier as ordered by the "charterers or their agents, where the vessel can safely lie, "always afloat . . . Provided always that if such discharging "place is not immediately available, demurrage in respect of all "time waiting thereafter shall be paid at the rate mentioned in "clause 17." By clause 17: "Should the vessel not be dis"charged at the rate herein stipulated, demurrage shall be paid "at the rate of eightpence British sterling per gross register ton "per running day and pro rata for any part of a day. Such "demurrage shall be paid day by day, when and where incurred." By clause 22: "The time for discharging at destination shall "be in accordance with the custom of the port for steamships at "the port of discharge." By clause 30: "The charterers' "liability under this charter shall cease . . . when the cargo is "shipped . . ."

By three bills of lading dated November 19, 1954, the plaintiffs, Roland-Linie Schiffahrt G.m.b.H., a Germany company, the owners of the s.s. *Werrastein*, acknowledged the shipment on board the vessel by the Australian Wheat Board of parcels of wheat therein mentioned for carriage to Hull, each bill of lading expressly incorporating all the terms, conditions, clauses and exceptions of the charterparty.

Until August, 1954, two docks were in customary use at the port of Hull for the discharging of grain, King George Dock and Alexandra Dock, but before the charterparty was entered into the discharge of grain at Alexandra Dock was abandoned and the only place where grain was discharged was at the King George Dock. The reduction in grain-discharging facilities and other factors led to congestion, and when the s.s. *Werrastein* reached the Humber all the berths in the King George Dock were occupied, and, on the instructions of the dock authorities, she was ordered to an anchorage to await a berth. In accordance with that order the s.s. *Werrastein* came to anchor at 2 p.m. on January 9, 1955, off Spurn Head, outside and about 22 miles from the port of Hull but one of three customary anchorages for large vessels awaiting entry to the docks to lie, where she waited until 9.3 p.m. on January 16, 1955, being detained for an agreed period of seven days, seven hours and three minutes.

The plaintiff shipowners sued the defendants, Spillers Ltd., Joseph Rank Ltd. and Micks, Lambert & Co., as holders and indorsees of one each of the bills of lading and the owners and consignees of the respective parcels of grain; relying on clauses 2 and 17 of the charterparty, as incorporated in the bills of lading, they claimed proportionate demurrage from each of the defendants at the rate of 8d. per gross register ton per day for the period during which the ship was delayed; alternatively, they claimed damages for breach of contract.

The defendants denied liability; they contended, inter alia, that, upon the true construction of the charterparty, the provisions of the last sentence of clause 2 had no application unless and until the vessel had arrived within the geographical, legal and fiscal limits of the ordered port and at a place inside the port where vessels customarily discharged or lay while waiting to proceed to a discharging berth, and that, therefore, those provisions did not apply to the time spent by the ship off Spurn Head.

The facts are more fully stated in the judgment.

Eustace Roskill Q.C. and *John Donaldson* for the plaintiffs. The *Werrastein* could only discharge her cargo of grain at the King George Dock, and since all the berths in that dock were occupied she had to wait. The discharging place, therefore, was "not immediately available" within the meaning of the last paragraph of clause 2 of the charterparty. The right to demurrage under that paragraph does not depend on whether or not a ship is an arrived ship, but on whether she is in fact kept waiting for a berth. The plaintiffs are not claiming in respect of lay time but are claiming compensation for time lost waiting for a berth, and they rely on *North River Freighters Ltd.* v. *H.E. President of India*,[1] where the Court of Appeal held that the words "time "lost in waiting for berth" were independent of the commencement of lay time. The argument that this provision does not operate until a vessel is within the geographical, legal and fiscal limits of the port is similar to the argument adduced for the charterers in *North River Freighters Ltd.* v. *H.E. President of India* [1] and rejected by the court. If the provision were not to operate until the ship had arrived in the dock, there would be no room or reason for it, for the ship would then be an "arrived" ship for lay time purposes. There is no more significance in the use of the word "demurrage" in the clause than there was in the use of the words "time lost" in *North River Freighters Ltd.'s* case.[1] "Demurrage" in this clause means "as if on demurrage" and the words "such discharging place" refer back to "dock, wharf or pier." "As ordered by the charterers" refers to the right of the charterers to nominate a berth and has nothing to do with whether or not a berth is available.

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[1] [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

If the ship was not in a position to enable the plaintiffs to claim under clause 2, then it is submitted that the defendants were under a duty to nominate a berth immediately she arrived off Spurn Head; that duty was not performed and the plaintiffs are entitled to damages for the loss of their rights under clause 2.

In any event, it is submitted that the ship had arrived at the port of Hull. She was at a place where ships waiting to discharge at Hull lie, and therefore she was at Hull notwithstanding that she was not within the geographical limits. [*Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[2]; *T. Lewis* v. *Louis Dreyfus & Co.*[3]; *Van Nievelt, Goudrian & Co. Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.*,[4] and Scrutton on Charterparties, 16th ed. (1955), p. 141, were referred to.]

The only distinction between the present case and that of *North River Freighters Ltd.'s* [5] is that there was in that case a finding that the ship was within the commercial area of the port, but there is no magic in the words "arrived ship" and whether or not a ship is an arrived ship must in every case depend not on whether the place she has reached is within the legal limits of the port but on the contract between the parties. Neither in this case, nor in that of *North River Freighters Ltd.*,[5] could the ship have gone any farther. The test is, was the ship in the proper place to wait? If she was, and the dock was not immediately available, the provisions for compensation in clause 2 apply.

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[1] [1956] 1 Q.B. 333.

[2] [1908] 1 K.B. 499; 24 T.L.R. 128.

[3] (1923) 17 Ll.L.Rep. 112; (1926) 31 Com.Cas. 239 (C.A.).

[4] (1925) 30 Com.Cas. 263; 21 Ll. L.Rep. 104; 41 T.L.R. 481.

[5] [1956] 1 Q.B. 333.

1956

ROLAND-LINIE SCHIFFAHRT G.m.b.H.
v.
SPILLERS LTD.

A. A. Mocatta Q.C. and *Michael Kerr* for the defendants. The risk of loss due to congestion falls on the shipowners unless the clear terms of the contract pass it on to the charterers, and clear and precise words are required to alter the common law rights of the parties. Clause 2 contains no such words. The provisions for payment of demurrage follow the provision requiring the ship to proceed to a customary dock "as ordered"; a nominated berth need not necessarily be immediately available: see *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Bros. & Co.*[6]; and the words "such discharging place" refer back to the customary dock, wharf or pier "as ordered" and mean the discharging place ordered by the charterers; the order to be given by the charterers, therefore, is a vital factor in the operation of the provision, and "demurrage thereafter" means after the order has been given. No order was given by the charterers in this case and, therefore, no claim to a fixed sum of money arises under the clause. Neither can there be any claim to damages arising out of the fact that no such order was given because there was no obligation to give the order. That obligation did not arise until a reasonable time after the arrival of the ship at the port of Hull. [Reference was also made to *Anglo-Danubian Transport Co. Ltd.* v. *Ministry of Food*[7] and *North River Freighters Ltd.* v. *H.E. President of India.*[8]]

The ship was not geographically at Hull, nor within the legal or fiscal limits of that port; from the point of view of a commercial man a ship off Spurn Head might just as well be at Grimsby or Immingham as at Hull. On the facts of this case and on the authorities the ship had not arrived and therefore there was no obligation on the charterers to nominate a dock, wharf or pier. The decision in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[9] was in relation to lay days but the test there laid down is of general application. The *North River Freighters Ltd.'s* case[10] does not assist the plaintiffs; in that case the court proceeded on the footing that the ship had arrived in the commercial area of the port and the question did not arise as to what tests were to be applied to determine whether the ship had arrived. What has to be considered here is when the obligation to order the ship to a dock, wharf or pier fell on the charterers, and on any view that cannot have arisen until the ship arrived in the commercial area of the port. [Reference was also made to *Owners of S.S. Plata* v.

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[6] [1891] 2 Q.B. 647; 7 T.L.R. 704.

[7] (1949) 65 T.L.R. 762; [1949] 2 All E.R. 1068; 83 Ll.L.Rep. 137.

[8] [1956] 1 Q.B. 333.

[9] [1908] 1 K.B. 499.

[10] [1956] 1 Q.B. 333.

Ford & Co.,[11] *Hudson's Bay Co.* v. *Domingo Mumbru Societa Anonyma*[12] and *Aktiebolaget Nordiska Lloyd* v. *J. Brownlie & Co. (Hull) Ltd.*[13]] It would be unfortunate if, in addition to the tests laid down in the authorities to determine whether or not a ship has arrived for the purposes of lay time and for the purposes of a cancellation clause, there was also a third category of cases in which a different test as to whether or not a ship has reached a port has to be applied.

If the order by the charterers to a customary dock, wharf or pier is irrelevant to a claim for compensation under the clause, then it is submitted that the word "thereafter" refers back to the arrival of the ship and the same arguments apply.

The plaintiffs' head of claim for damages for breach of contract for loss of their rights under the clause cannot be sustained. If failure to give the order amounted to a breach of contract, it was a breach not by the defendants but by the charterers, the Australian Wheat Board, for which the defendants are not liable. The incorporation of the terms of the charterparty into the bills of lading is not wide enough to transfer liability in this respect to the defendants: see *Andreas Vergottis* v. *Robinson, David & Co. Ltd.*[14]

Eustace Roskill Q.C. in reply. None of the authorities cited are relevant to this case except the *North River Freighters Ltd.'s* case.[15] It is not a question of whether or not the ship had arrived but whether or not she had got as far as possible. She had got as near as she could to Hull and it would have been a useless formality and an unnecessary expense for her to have gone up the Humber to the King George Dock in order to establish her rights under the clause, and then to have returned to Spurn Head. As to unnecessary expense, see *Noemijulia Steamship Co. Ltd.* v. *Minister of Food.*[16] [Reference was also made to *Horsley Line Ltd.* v. *Roechling Brothers.*[17]]

Cur. adv. vult.

July 27. SELLERS J. read the following judgment: The plaintiffs are the owners of the s.s. *Werrastein*, 6,737 tons gross register, 521 feet long, 62 feet in beam. She was chartered to the Norddeutscher Lloyd, of Bremen, who engaged her by a charterparty dated September 10, 1954, with the Australian Wheat Board to load a part cargo of wheat in bulk at Sydney, New South Wales, for carriage to one safe port on the East Coast of Great Britain.

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[11] [1917] 2 K.B. 593.

[12] (1921) 9 Ll.L.Rep. 196; (1922) 10 Ll.L.Rep. 476 (C.A.).

[13] (1925) 30 Com.Cas. 307; 41 T.L.R. 503; 21 Ll.L.Rep. 128.

[14] (1928) 31 Ll.L.Rep. 23.

[15] [1956] 1 Q.B. 333.

[16] [1951] 1 K.B. 223; 66 T.L.R. (Pt. 2) 342; [1950] 2 All E.R. 699.

[17] 1908 S.C. 866.

Three bills of lading dated November 19, 1954, comprising the whole of the part cargo, acknowledged the shipment at Sydney by the Australian Wheat Board of the stated quantities of wheat in bulk for carriage to Hull. Each of the bills of lading expressly incorporated all the terms, conditions, clauses and exceptions of the charterparty dated September 10, 1954.

The three defendants, all well known in the grain trade, became holders and indorsees of one each of the bills of lading and were at all material times the owners and consignees of the respective parcels of grain.

The present claim against them arises out of the circumstances which existed and developed when the *Werrastein* reached the Humber. She was delayed just over a week before she could discharge and deliver her cargo to the defendants. The plaintiffs claim that the charterparty required the defendants to pay proportionately for this waiting period at the rate of 8d. per gross register ton per running day or pro rata for any part of a day, or, alternatively, that a like sum is recoverable as damages for breach of contract. The defendants deny that any liability attaches to them under the terms of carriage and deny any breach of contract.

The vessel was undoubtedly delayed because a discharging place was not available until a week after she reached the Humber. In 1925 Scrutton J.[1] said that as long as he could remember there had been controversy between shipowner and charterer as to who is to bear the risk of waiting at a port for a berth. This case sustains the controversy.

It is necessary to review the particular circumstances at Hull. Until August, 1954, two docks were in customary use for the discharging of grain, King George Dock and Alexandra Dock. Only the former had grain elevators, including portable equipment. In the Alexandra Dock discharge of grain customarily took place by bagging the bulk grain on board and then either discharging the loaded bags or emptying the bags over the side into lighters. Apparently new labour brought into Hull for dock work regarded the discharge by bagging as antiquated and refused to carry it out. Instead of continuing until such time as more modern methods and machinery could be adopted, the dock labourers refused to work the hand discharge, and in order to terminate a strike the method was abandoned. Before the charterparty was entered into the only place where discharge of grain was taking place at Hull was the King George Dock by means of the elevator machinery available there. This reduction in grain discharging facilities and the hold-up of the strike led to congestion, and when the *Werrastein* reached the Humber all the berths and mechanical discharging equipment in the King George Dock were occupied and not available for her.

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[1] *Van Nievelt, Goudrian & Co. Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.* (1925) 30 Com. Cas. 263, 267; 41 T.L.R. 481; 21 Ll.L.Rep. 104.

In fair weather a pilot cutter normally lies off the Spurn Lightship in the entrance to the Humber and incoming vessels report to the cutter and take on a pilot in that vicinity. The plaintiffs' vessel so reported and was informed, as was the fact, that no berth was available and she was to proceed to an anchorage to await a berth. The responsibility for allocating berths rests with the dock authorities, the British Transport Commission, and it was on their decision that the order was given. The order in which ships are called into dock for berthing is determined by and follows the order in which they have reported to the pilot cutter. Had there been no congestion, and if the dock authorities had so allowed and ordered, a vessel of the *Werrastein's* size could have waited in the King George Dock adjacent to the south-east corner of that dock. The position was apparently not available, and she was not allowed to enter.

There are at Hull three customary anchorages for large vessels to lie, an anchorage off Spurn Head, known as "Below the "Bull," Hawke Road and Sunk Road. The vessel came to anchor in the first area at 2 p.m. on Sunday, January 9, 1955, and remained there until 9.3 p.m. on Sunday, January 16, 1955, an agreed period of seven days, seven hours and three minutes. This anchorage was about 22 miles from the King George Dock, but I am satisfied and I find that if the plaintiffs' vessel had, on her arrival in the Humber, gone up to the King George Dock, she would have been refused entrance and have had to return to one of the three anchorages which all lie near the entrance to the Humber. A vessel of her size could not safely anchor and would not be allowed to lie in the Humber in the vicinity of the docks.

There appears to be no statutory delineation of the area of the port of Hull, and those who are well acquainted with the port do not seem sure of its boundaries. The first dock to be built was the Queen's Dock, under an Act of 1774, and since then further docks have been constructed from time to time under various Acts which prescribed the limits of the powers of the dock master for the regulation of the dock, which extended a certain distance into the river Humber but never more than 350 yards which was prescribed for the King George Dock, "measured in every direction riverward from the centre (in line "with the river wall) of the entrance of the dock": [Hull Joint Dock Act, 1899, s. 78].

The Humber pilotage district extends well west of Hull up the Humber and eastwards to the sea. A customs warrant which fixes the customs limit gives the westerly limits and continues: "it shall extend down the River Humber and on both sides "thereof to a supposed straight line drawn from Skitter Ness on "the Lincolnshire Bank of the said River Humber to Paull "Lighthouse on the Yorkshire side thereof (being the north-west "boundary of the Port of Grimsby)." This line is about one and a half miles south-east of the entrance to the King George Dock, the most easterly dock in the port of Hull.

One witness regarded that line as being generally recognized as the south-easterly boundary of the port of Hull. Whether that be so or not, the three customary anchorages are not, it would seem, on any possible view within the geographical, legal and fiscal limits of the port of Hull, but they are adjuncts of the port and are the customary places for large vessels to anchor whilst awaiting entry to the docks. The port of Hull has no such anchorage within its rather narrow confines, and these anchorages provide a facility for the port without which it would be severely handicapped for its trade and commerce.

It is in these circumstances and on these facts generally stated that the plaintiffs base their claim under clause 2 of the charterparty, which is as follows, as far as is material to this case: "Being so loaded, the vessel shall proceed with all reasonable speed . . . to discharge at one safe port on the East Coast "of Great Britain . . . or so near thereunto as the vessel can "safely get, always afloat, and there deliver the cargo, in accordance with the custom of port for steamships as provided for "by clause 22, at any customary dock, wharf or pier as ordered "by the charterers or their agents, where the vessel can safely "lie, always afloat, upon being paid freight at the rate hereinafter mentioned. Provided always that if such discharging "place is not immediately available, demurrage in respect of all "time waiting thereafter shall be paid at the rate mentioned in "clause 17." As Hull was the destination in the bills of lading, the discharge was to be at Hull at any customary dock, wharf or pier, which in the circumstances meant the King George Dock or any wharf or pier within it. The charterers or their agents had in the circumstances no option as to the dock, but could have ordered her to a particular berth there, as eventually they did.

The case for the defendants was that the vessel was not an arrived ship, and the time had not come for the defendants or any one of them to order her to any dock, wharf or pier, and no order had been given. Until she was so ordered the proviso did not come into operation as " demurrage in respect of all waiting " time thereafter " meant after the order to the discharging place (which proved, in the event, not to be immediately available). In any case, it was submitted, the vessel never reached the port of Hull until the evening of January 17, 1955, and the waiting time could not run until she reached the port.

For the shipowners it was contended that under the bills of lading the vessel was impliedly ordered to the King George Dock, as it was the only customary dock for discharge of a grain cargo at Hull; alternatively, that if an order was necessary the defendants were in breach of contract in not giving one, and they could not, by withholding an order in the circumstances in which the vessel was at anchorage, avoid their liability for waiting time and place it upon the shipowners.

It seems to be clear that " demurrage," as it is called in the proviso, cannot be payable unless the vessel is kept waiting because her discharging place is not immediately available for her to take up. The discharging place must therefore of necessity be known before it can be ascertained whether it is available or not. In many cases it will not be known until it is ordered by the charterers or their agents on the vessel's arrival at the appropriate place for the order to be given. Here the vessel had to discharge in the King George Dock. The precise berth had not been ordered, but the dock included all the berths therein. It was at all material times clear that any discharging place within the dock was not available, and that is why the order to the anchorage was given to the vessel and the only reason why she waited there. An incoming vessel may go to one of the anchorages for various reasons. She may go to await the tide or a tug or because of damage or breakdown, illness of crew, etc. In any such case it could not be said that she had completed her voyage to Hull when she was still 22 miles away. But in the present circumstances I am prepared to find (if it be necessary) that the plaintiffs' vessel was to be treated as having arrived at

1956

ROLAND-LINIE SCHIFFAHRT G.m.b.H. v. SPILLERS LTD.

Sellers J.

the port of Hull. It would have been an idle and wasteful formality to have travelled a fruitless 22 miles and back merely to establish her rights, and I am not prepared to find that the terms of the charterparty necessitated it. The essence of the right to claim under the proviso is that the vessel is kept waiting because the discharging place is not immediately available, and that is the essential question of fact which gives a right to compensation at the rate of demurrage mentioned in clause 17, which is quite independent of and distinct from any right to demurrage after lay days have commenced to run.

It is clear, also, that the three anchorages were the customary waiting places for large vessels trading in and out of Hull, and were recognized facilities of the port, and no less so than if they had, by the favours of nature, been within the confines of the port of Hull itself.

The vessel had reached the appropriate waiting place for the port. She was ready to discharge. She had to wait there because no berth was available. She had, therefore, in the course of her voyage to Hull, reached the place where she had to stop until a berth was available. The considerations which apply to a vessel which has to wait are obviously different from those which apply to a vessel which has to load or discharge, or may often be so. A vessel cannot load or discharge until she is in the position properly designated for the purpose. It depends on the contract and the circumstances whether a vessel has reached the place where she is available for discharge and when the time commences from which the period for discharge will run. Clause 2 provides that the vessel shall deliver the cargo in accordance with the custom of the port for steamships as provided by clause 22. The time for discharging would not commence to run whilst a vessel was at the anchorage. She would not be an arrived ship.

In my view, the proviso deals with waiting time (due to the discharging place being unavailable) before lay days commence to run, and provides for just such an occasion as has arisen here. The loss due to waiting for discharge has to fall on one of the parties to the adventure and, of course, depends on the terms of their bargain; but, provided the vessel has reached the recognized waiting place for the port, she can do no more than be ready and available to discharge. The cargo owner has the selection (within the terms of the contract) of the place of discharge. It does not seem wholly inappropriate that if loss by waiting for a berth is incurred it should fall on the charterers or consignees. The ship has to face the hazards of the voyage whereby she may be delayed by storm, fog, tides and many other events. But for clause 2 the waiting at the anchorage would likewise have fallen on the ship, for it would seem that the earliest time, on any view, that she could have become an arrived ship so that time for discharge would run against the charterers or their agents would be when she entered the King George Dock, and she could not have done that before she in fact did enter.

The argument for the defendants relied on the many authorities relating to the question of when a vessel was an arrived ship so that she could give notice of readiness to load or to discharge, or from when time would run for discharge if no notice was required. I do not refer to these authorities because, in my opinion, they have no relevance to the present claim, and I would accept the contention that if the plaintiffs had to establish that their vessel was an "arrived ship" under the requirements of clause 22 the claim would fail.

Support for the views I have expressed is, in my opinion, to be found in the recent case in the Court of Appeal of *North River Freighters Ltd.* v. *H.E. President of India.*[2] There clause 5 provided: "Time lost in waiting for berth to count as loading "time." The vessel had come to anchor in the quarantine anchorage for Dairen, to which port she had been chartered to proceed to "one safe berth Dairen (Manchuria)" to load. The quarantine anchorage was found to be within the commercial area of the port of Dairen. It was held that the provision relied on was wholly independent of the commencement of loading time. As the case came before the court on a special case it does not reveal the evidence on which it was found that the quarantine anchorage was within the commercial area of the port. If commercial area is used in the sense of Kennedy L.J.'s judgment in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[3] it would appear to be a limited area within the legal limits of the port and relevant with regard to the commencement of loading time (if a port charterparty). All the Lords Justices upheld the shipowners' claim on the ground that the clause gave an additional right, and that the ship had not first to bring herself within clause 17, which provided: "Lay days to commence 24 hours "after vessel is dunnaged, matted and all hatches ready for

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[2] [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

[3] [1908] 1 K.B. 499, 517; 24 T.L.R. 128.

" cargo, and captain having given written notice . . . to that " effect to charterers or their agents."

Singleton L.J. said[4]: " The clause as to time wasted is " independent of clause 17. It is inserted to avoid questions " which have arisen in many cases which have been before the " courts. The risk of time wasted in waiting for a berth is put " upon the charterers whose agents are, or ought to be, familiar " with local conditions." Later he said[5]: " In my opinion, the " provision as to notice in clause 17 does not affect the question " arising under clause 5 of the charterparty, and the lack of a " notice under clause 17 does not avoid the owners' rights in " regard to time lost through waiting for a berth. The notice is " something which has to be given for the purpose of calculating " lay days. That calculation is independent of the provision in " clause 5, though the one has to be added to the other to " reach the true position under the contract. There was certainly " no obligation on the master to give a notice under clause 17 " when the vessel arrived at—or perhaps I should say reached— " the port of Dairen. The charterers knew of her arrival and the " next step was for them to nominate the berth to which they " wished her to go. If they failed to do so within a reasonable " time, and without any adequate explanation, time was lost by " the ship in waiting for a berth. It was to meet such a case " that the words in clause 5 were inserted in the charterparty."

Jenkins L.J. said[6]: " The matter must, therefore, as it seems " to me, be dealt with on the footing that the *Radnor*, having " arrived in the commercial area of the port of Dairen, was in " fact ready to load and ready and able to proceed to any berth " the charterer might designate by 9.30 a.m. on June 3, but was " kept waiting for a berth until 4.30 p.m. on June 10, owing " to the charterer's failure to nominate the berth to which she " was to proceed. In these circumstances, it seems to me to be " clear that the period from 9.30 a.m. on June 3 to 4.30 p.m. on " June 10 was ' time lost in waiting for berth ' according to the " natural and ordinary meaning of those few simple words, with " the result that, unless some qualification of their natural and " ordinary meaning is to be read into them, the period in " question must count as loading time by the express terms of " clause 5 of the charterparty."

Then there is a short passage from the judgment of Parker L.J.[7]: " No doubt ' time ' cannot be said to be ' lost '

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[4] [1956] 1 Q.B. 333, 340.
[5] Ibid. 341.
[6] Ibid. 344.
[7] Ibid. 349.

"until it has begun to run, but it surely begins to run when the "vessel has reached the point where she has to stop until a berth "is available. It seems to me that that is the natural meaning "of the words, and that the expression is wholly independent "of the time when loading time commences."

On the view which I have taken of the present case the alternative claim for breach of contract, and the issues which would arise out of it do not call for consideration. It was submitted for the defendants that if there were such liability as I have found, liability did not fall upon the defendants as holders of a bill of lading and as consignees of the goods, but would fall on the charterers. It was, however, an express term of each bill of lading that all the terms, conditions, clauses and exceptions of the charterparty should be incorporated, and I find nothing inconsistent or insensible in the relevant clauses so as to make them inapplicable to the bill of lading and unenforceable against the defendants.

In my opinion, the claim succeeds and judgment will be entered for the plaintiffs against Spillers Ltd. for £614 4s. 6d., Joseph Rank Ltd. for £409 9s. 8d., and Micks Lambert & Co. for £614 4s. 6d.

Judgment for the plaintiffs.

Solicitors: *William A. Crump & Son; Theodore Goddard & Co. for Andrew M. Jackson & Co., Hull.*

J. F. L.

BARNSLEY CORPORATION *v.* LANCASHIRE COUNTY COUNCIL.

1956
Oct. 5, 18.

Lord Goddard C.J., Hilbery and Ashworth JJ.

Children and Young Persons—Approved school order—Residence—Child resident in institution when order made—Home in which he lived before entering institution no longer in existence—Appropriate authority to be named in approved school order—Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 70 (2) *and proviso,* 90 (2).

Lancashire magistrates made an approved school order in respect of a boy of 15 who had committed an offence while in an institution for which Lancashire County Council was responsible, and who was so resident at the time when the order was made. Before March, 1944, at which date he had been committed to the care of the county council by a juvenile court, he had lived with his parents

1956

Barnsley Corporation v. Lancashire County Council.

in Lancashire, but his parents had subsequently left the county and were living in Yorkshire within the district of the Barnsley County Borough Council at the time when the approved school order was made. The magistrates decided that the boy's place of residence was the place where his parents resided and they accordingly named Barnsley Corporation in the order pursuant to section 70 (2) of the Children and Young Persons Act, 1933.[1] The corporation appealed to the magistrates under section 90 of the Act, on the ground that the boy was resident within the district of the respondent county council. That appeal was dismissed. On appeal to the Divisional Court:—

Held, (1) that section 70 (2) of the Act did not empower the magistrates to decide as they had because, for the purposes of the subsection, a child's place of residence was the place where he actually lived at the time that the order was made.

South Shields Corporation v. *Liverpool Corporation* [1943] K.B. 264; [1943] 1 All E.R. 338 applied.

(2) That where a child was or had been in an institution, and magistrates, disregarding that period, as required by the proviso to section 70 (2), found that the home where the child had previously lived no longer existed, such place could not satisfy the requirements of section 70 (2) as a place of residence, since it was not a place where the child could possibly have lived at the time when the order was made. If, on the other hand, the child's past home was still in existence, it could, notionally and sensibly, be regarded as his home at the time of the making of the order.

(3) That in a case such as the present, where the child's previous home had ceased to exist, the magistrates should have decided that his home was unknown and accordingly named in the order the local authority in whose area the offence was committed,

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[1] Children and Young Persons Act, 1933, s. 70 (2): "Every "approved school order, other than "an order . . . or made by reason "of the commission of an offence "under section 10 of this Act . . ., "shall name the local authority with-"in whose district the child or young "person was resident, or if that is "not known, the local authority or "one of the local authorities within "whose district the offence was com-"mitted or the circumstances arose "(as the case may be) rendering him "liable to be sent to an approved "school: Provided that—(*a*) in deter-"mining for the purposes of this sub-"section the place of residence of a "child or young person, any period "during which he resided in any "place as an inmate of a school or "other institution . . . shall be dis-"regarded."

S. 90 (2): "A court by which an "approved school order is made shall "cause a copy thereof to be served "forthwith on the local authority "named in the order, and if that "authority desire to contend that the "person to whom the order relates "was resident in the district of some "other local authority or was resi-"dent outside England they may . . . "appeal—(*a*) . . . to a court of "summary jurisdiction . . . and if, "upon the hearing of the appeal, the "court is satisfied that the person "to whom the order relates was "resident in the district of that other "local authority, or was resident out-"side England, the court may by "order vary the approved school order "by substituting therein the name of "that other authority. . . ."

but, as it was not open to the appellants under section 90 to appeal on that ground, for the child was not resident in the district of the respondents, their appeal failed; and the appellants remained the authority named in the order although they should not have been so named.

Isle of Wight County Council v. *Warwickshire County Council* [1953] 1 Q.B. 553; [1953] 1 All E.R. 525 applied.

CASE STATED by Lancashire magistrates sitting at Leigh.

On December 20, 1955, Lancashire magistrates sitting at Leigh made an order committing a boy named Norman Patrick Brown to an approved school and naming Barnsley County Borough Council (in Yorkshire) as the local authority within whose district the boy was resident, in pursuance of section 70 (2) of the Children and Young Persons Act, 1933.[1] A copy of the approved school order was served on the Barnsley Corporation in compliance with section 90 (2) of the Act on December 22, 1955. The corporation appealed to the magistrates under section 90 of the Act on the ground that the boy was resident within the district of Lancashire County Council, and the appeal was heard on March 14, 1956.

The following agreed statement of facts was presented to the magistrates and no evidence was called on either side.

The boy was born on September 25, 1941, and on March 23, 1944, while living with his parents at Chapel Lane, Coppull, near Chorley (Lancashire) was brought before the juvenile court at Chorley as being in need of care or protection due to his parents' neglect. The court made a " fit person order " committing him until he reached the age of 18 years to the care of the Lancashire education committee. The responsibility for his care was taken over from the education committee by the Lancashire County Council Children's Department on its inception in 1948.

From his committal in 1944 until May, 1954, he was in St. Vincent's Home, Fulwood, Preston, Lancashire. In that month he was boarded out in a foster home, where he remained for a period of some four months, until the foster parents asked for his removal on account of his persistent nocturnal enuresis. He was then admitted to one of the reception centres maintained by the Lancashire County Council Children's Department, where he remained for one month. It was then decided that he was unsuitable at that stage for further boarding out, and on October 14, 1954, he was moved to the Oaklands Children's Home, Lowton St. Mary's, for a period of training. At first the boy seemed to settle very well in Oaklands, but gradually his behaviour deteriorated and became very bad. He absconded from the home several times and on August 29, 1955, it became necessary to remove him and return him to the reception centre, as he had become completely out of control. He remained there until September 19, 1955, when he was returned to Oaklands Children's Home, from which he again absconded twice. After the second of these, he was taken to the Homelea Remand Home on December 15, 1955, where he was at the time of his committal to the approved school. His committal to the approved school was in respect of an offence of stealing cigarettes, committed at the children's home, Lowton.

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[1] For footnote, see p. 124.

The boy's parents went to Barnsley in February, 1947, and were now living at Railway Terrace, Carlton, Barnsley. The boy himself had never been to Barnsley, although in August, 1952, his parents unsuccessfully applied for revocation of the "fit person order."

It was contended for the corporation (1) that the material time for the purpose of ascertaining residence was the time of the making of the approved school order; (2) that when the order was made the boy was in the care of the county council's children's department, and by the proviso to section 70 (2) of the Act the period during which he resided in any place as an inmate of a school or other institution, or while boarded out under the Act should be disregarded; (3) that the boy's residence must therefore be either what it was when he first came into the care of the corporation or his constructive residence with his parents; (4) that the meaning of residence was settled by *Stoke-upon-Trent Corporation* v. *Cheshire County Council*[2] as the place where a person lived, where he had his bed and where he dwelt, and not the place where he might be said constructively to reside; accordingly, as the boy had never been to Barnsley in his life he could only have a constructive residence there, which was not applicable, and his only other residence was, until 1944, in the district of the Lancashire County Council.

It was agreed, on behalf of the county council, that the material time for determining residence was the time when the approved school order was made, and it was contended (1) that at the time when the order was made the actual residence of the boy could not be considered by reason of the proviso to section 70 (2); (2) that in the circumstances the only residence which could possibly be considered was the boy's constructive residence with his parents, that being the place where he would have been residing but for the "fit person order"; (3) that *Stoke-upon-Trent Corporation* v. *Cheshire County Council* [2] was distinguishable as being a decision under the provision of a different Act, being entirely related to its own facts, and was of no assistance as an authority laying down any principle of law; but that, on the other hand, it was established in *Rex* v. *North Curry Inhabitants* [3] that the word "residence" could, in principle, be construed as the place where a person's family actually resided.

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[2] [1915] 3 K.B. 699.

The magistrates were of opinion that the boy was resident at the material time within the district of the Barnsley Corporation, and that the corporation was correctly named in the approved school order. They accordingly dismissed the appeal.

The corporation appealed.

J. McLusky for the corporation. The question is whether this boy was resident for the purposes of section 70 (2) of the Children and Young Persons Act, 1933, within the district of the County Borough of Barnsley or that of the Lancashire County Council. One or other of those authorities has to bear some part of his maintenance at the approved school to which he has been committed. The case shows that the boy spent most of his life in institutions under the control of the Lancashire County Council. He has not been in the care of his parents since 1944 and was not in their care when the order was made. It is artificial to say that he was residing with them. On the authorities a child or young person's residence for the purposes of section 70 (2) is the place where the child himself resides. It is not necessary to consider where his parents live. In a case such as the present, where a child or young person is, or has been, in institutions, the proviso to section 70 (2) applies and the periods in which he has been in institutions are to be disregarded. Applying the proviso in the present case one is thrown back to 1944, when the boy last had a residence of his own. That was in Lancashire.

The justices here have adopted the test of "constructive "residence," which is not the proper test to apply: see *Stoke-upon-Trent Corporation* v. *Cheshire County Council.*[4] It is true that that case was decided under a different Act, namely, the Children's Act, 1908, and in *South Shields Corporation* v. *Liverpool Corporation* [5] Viscount Caldecote C.J. did not consider it of

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[2] [1915] 3 K.B. 699.

[3] (1825) 4 B. & C. 953.

[4] [1915] 3 K.B. 699.

[5] [1943] K.B. 264; [1943] 1 All E.R. 338.

1956

BARNSLEY CORPORATION v. LANCASHIRE COUNTY COUNCIL.

assistance, but it was regarded as a useful authority by the Divisional Court in *Isle of Wight County Council* v. *Warwickshire County Council.*[6] The respondents submitted before the justices that the *South Shields* case[7] was authority for the proposition that "constructive residence" is the proper test, but it is submitted that it is not and that in any event the facts of that case are quite different from those of the present case. That case concerned a girl in respect of whom an approved school order was made following a probation order putting her under the care of the Liverpool probation officer. When she originally came before the court she had been living in South Shields, but by the time that the approved school order was made she had been all over the country and had been living with her sister in Liverpool, although she spent the night before the approved school order was made in South Shields. The Divisional Court decided that the court had to look to see where the girl was resident at the time when the approved school order was made. That meant that the court had to ask themselves where her residence, in the sense of her home, was: see *per* Viscount Caldecote C.J.[8] That conclusion is applicable to the present case. One must look at the reality of the matter. Where a child has been removed from the care of his parents by the action of a court of law, it is highly artificial to say that he is residing with them.

[HILBERY J. If the boy was not resident in Barnsley, which local authority should be named in the order?]

This boy had no residence in the actual sense of the word. In those circumstances the justices should have named in the order the local authority in whose area the offence was committed. *Isle of Wight County Council* v. *Warwickshire County Council,*[9] where the Divisional Court decided that there was a lacuna in the Act of 1933 and that quarter sessions had no power to substitute in the order the name of the local authority in whose area the offence was committed, was primarily procedural and is distinguishable on its facts.

R. L. Ward (*J. M. Davies* with him) for the county council. This matter is concluded in the respondents' favour by *Isle of Wight County Council* v. *Warwickshire County Council,*[9] because it was for the appellants to prove in front of the justices not merely that the boy was not resident in the district of the Barnsley Corporation but that he was resident in the district of the Lancashire County Council. Having regard to the terms of section 90 (2) of the Act it is unnecessary for the respondents to contend that the boy was resident in Barnsley. The *South Shields* case [10] is authority for the proposition that the material time for deciding the child's residence is the time when the order is made. The proviso to section 70 (2) precludes the court in the present case from looking at the boy's residence at that time because he was then in an institution, but it does not say that the court can go back and look at some prior residence.

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[6] [1953] 1 Q.B. 553; [1953] 1 All E.R. 525.

[7] [1943] K.B. 264.

[8] Ibid. 268.

[9] [1953] 1 Q.B. 553.

[HILBERY J. The proviso says that institutional residence must be ignored. If you eliminate such periods, you find that the boy has no known residence. You are then faced with the lacuna in the Act.]

That may be why the Act provided for the insertion in those circumstances of the name of the local authority in whose district the offence was committed. In the present case the boy has not been residing in Lancashire for 12 years. His parents have left the county and in no real sense is he resident within the county district. It is no more artificial to say that he is constructively resident in Barnsley than to say that he is resident in Lancashire.

McLusky, in reply, referred to *Isle of Wight County Council* v. *Warwickshire County Council*.[11] There is a fundamental difference between the facts of that case and those of the present case. In the *Isle of Wight* case [11] the boy ran away from Warwickshire and the evidence was that he did not intend to return there, so that it could not be said that he had a home in Warwickshire. Nor had he a home in the Isle of Wight. Had the facts of that case been similar to those of the present case, the magistrates could not have named the Warwickshire County Council in the order. In the present case the boy, before living in institutions, was clearly resident in Lancashire. It is immaterial for the purposes of the proviso whether the period in institutions amounts to years or merely weeks. The principle is the same. This boy has had no residence in the actual sense of the word since he was two years of age, but at that age he had a residence and if one applies the proviso, one must go back to that residence.

[ASHWORTH J. To do such dating back seems to fly in the face of the *South Shields* [12] decision.]

[10] [1943] K.B. 264.

[11] [1953] 1 Q.B. 553.

[12] [1943] K.B. 264.

1956

BARNSLEY CORPORATION v. LANCASHIRE COUNTY COUNCIL.

[LORD GODDARD C.J. The burden is put upon you not merely of showing that the order is wrong but of showing what order ought to be made.]

That is so where there is no known residence. It is submitted that this case does not come under section 90 (2) at all. It comes under section 87 of the Magistrates' Courts Act, 1952, and the court can step into the shoes of the justices and make the right order if the justices have made a wrong one. It is distinguishable from the *Isle of Wight* case [13] as there the matter had already been to quarter sessions.

Cur. adv. vult.

October 18. HILBERY J. (whose judgment was read by LORD GODDARD C.J.) stated the facts and continued: It was common ground that the magistrates making the approved school order had to apply the provisions of section 70 (2) of the Children and Young Persons Act, 1933, including the proviso to that subsection, in deciding what was the place of residence of the boy at the time of the making of their order.

It was also the contention on both sides that the material time for the purposes of ascertaining the residence of the boy was the time of the making of the approved school order, and reliance was placed on *South Shields Corporation* v. *Liverpool Corporation.*[1]

The material parts of section 70 (2) and the proviso are in the following terms: [His Lordship read the subsection and the proviso and continued:] The magistrates decided in favour of a contention of the respondents that the place of residence of the boy at the time of the making of the order was where his parents resided in Barnsley, and they accordingly named the appellant corporation, as they were required to do by the section, the authority for the district where the boy resided.

In my view the provisions of section 70 (2) do not empower the magistrates so to decide, or indeed leave it open to them so to decide. The Act does not state that the child shall be deemed to reside with his parents wherever the parents may be, which is what the magistrates have decided. The Act requires the magistrates to ascertain what is the child's place of residence, and, as decided by this court in the *South Shields Corporation* case,[1] that must be the child's residence at the time of the making of the order.

[13] [1953] 1 Q.B. 553.

[1] [1943] K.B. 264; [1943] 1 All E.R. 338.

If the child is not at the time and has not for any period been in an institution the proviso does not apply and no difficulty arises. The only question then is where, on the facts, it ought to be decided that the child resides, that is to say, actually lives. If the child is or has been in an institution, which is this case, then the proviso requires the magistrates to disregard the periods of time in the institution or institutions. Since a place of residence for the purposes of the section must, according to the authorities, be a place where he actually lives, a place such as his parents' address at Barnsley, where he has never actually lived, cannot qualify as his place of residence. If, at the time of the making of the order, the home where he actually lived before the times when he had been in institutions no longer exists, it is not a place where the child could possibly reside at the time when the order is made, and therefore cannot satisfy what is necessary for it to be, a place of residence.

The result, in my view, is that in such circumstances, when, as here, after disregarding the times during which the child has been in an institution the only residence in which the child has actually lived is found to be non-existent, the magistrates cannot say for the purposes of the section that the child is living there. It cannot matter whether that former home has ceased to exist because the parents have both died or have merely moved away to somewhere else. When the periods in institutions have been disregarded, what is discovered is that the residence where once the child actually lived is no longer a place of residence where he could actually live at the time when the order is made. It would reduce the working of the proviso in such circumstances to an absurdity to say that the magistrates must then hold that the child was presently resident in a non-existent place of residence in which he could not possibly then reside.

These are the circumstances in this case so far as the child's one-time home at Coppull is concerned. It follows, I think, that if Coppull was not the child's place of residence for the purposes of the section, then the place of residence of the child at the time of the making of the order was not known.

The appellants' contention that, if the periods in institutions are disregarded, the child's place of residence is Coppull, and that that should be entered in the order in question as his place of residence at the time of making the order, fails. In my opinion the magistrates should have arrived at the conclusion that the residence of the child for the purpose of the section was unknown, and should have named in the order the local authority within whose district the offence was committed.

The construction which I have thus put upon section 70 (2) and the proviso to it meets the case whether the child has only recently been put in an institution, or has been for a long time in institutions since last he had a place of residence. If the home where he resided before being put in an institution still exists in the case where the child has been for a long, or a short, time in an institution, then that is the place of residence of the child, because disregarding the periods during which he has been in the institutions he is found actually living in a place of residence, a home, which still exists as such and can therefore notionally and sensibly be said to be his present home at the time of the making of the approved school order. I say notionally and sensibly because, if the intervening periods of time between his leaving home and the date when the approved school order is made are disregarded, what was his past home if it still exists is to be regarded as his present home.

The result in this appeal is certainly not satisfactory, because while we all feel that the magistrates were mistaken in holding that the child's place of residence was Barnsley, the appellants could only appeal against being named in the order on the ground that the child's place of residence was within the district of another authority. In this case they contended that the other authority was the respondent council. That contention we are deciding was wrong. It was not open to them to appeal on the ground which we have held was right, namely, that the case was one where the residence of the child was not known and the authority named in the order should have been the authority within whose district the offence was committed. The Act does not enable them to advance that contention as a ground of appeal, and it was so decided in *Isle of Wight County Council* v. *Warwickshire County Council.*[2] The result, therefore, is that the appellants remain the authority named in the order though they should not be so named.

Lord Goddard C.J. I agree with the judgment just delivered. More than three years ago, in February, 1953, the same question as arises in this case arose in *Isle of Wight County Council* v. *Warwickshire County Council*,[2] to which Hilbery J. has referred. In that case, which was not taken to appeal, the court pointed out that where a local authority who has been named as the authority within whose district a person to whom an approved school order relates appeals, and shows that that person does not reside within its district, and that the offence was not committed within its district, but cannot show that the person named in the order resides in the district of another authority, the court has no power to substitute for the appellant authority the authority in whose district the offence was committed. We said that the decision which we were obliged to give was not conspicuously just, and this was indeed an understatement as this case shows. This boy never had anything to do with Barnsley. In fact, he had always lived in Lancashire, both before he was sent to an approved school and while he was there, but for the reasons given in the judgment just delivered it is impossible to hold that at the time of the making of the order, ignoring, as the Act requires, the years spent in the school, he had a residence in that county. It should be remembered that when magistrates make an approved school order no opportunity is given to the local authority whose name is inserted in the order to appear and object. All that authority can do is to appeal, and although it is proved beyond a peradventure that the boy is not, and maybe never has been, resident in the appellant's district, and committed the offence in some entirely different district, the order, although made ex parte, must stand. This injustice results from the fact that section 90, which gives an appeal, is so limited that it has omitted to cover the situation where the place of residence is unknown, and would seem to be an obvious lacuna, the result, no doubt, of a slip on the part of the draftsman. We again call the attention of the appropriate department to this matter in the hope that an opportunity may be found to remedy by legislation this unsatisfactory state of affairs.

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[2] [1953] 1 Q.B. 553; [1953] 1 All E.R. 525.

Ashworth J., who is unable to be present, asks me to say that he agrees with the judgment which I have just read. The appeal therefore fails.

Appeal dismissed with costs.

Solicitors: *Torr & Co. for A. E. Gilfillan, Town Clerk, Barnsley; Norton Rose & Co. for Sir Robert Adcock, Clerk, Lancashire County Council.*

E. M. W.

C. A.

1956
Oct. 5, 10, 11, 12.

Singleton, Jenkins and Parker L.JJ.

BRYERS *v.* CANADIAN PACIFIC STEAMSHIPS LTD.

Dock — Regulations — Shipbuilding — Dry dock — Several repairers contracting with shipowners—No notional occupier—Accident to shipowners' employee — Liability of shipowners — Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), "*Duties,*" *reg.* 10.

Factory — Persons benefited by regulations — "Person employed" — Seaman employed as yeoman carpenter by shipowners — Work of repair on ship in public dry dock—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 79 — *Shipbuilding Regulations,* 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12).

Statute — Construction — Proviso — Exceptions. Judicial Precedent — Court of Appeal decision—Per incuriam—Whether point argued.

An able seaman employed as a yeoman carpenter by the owners of a ship which was undergoing overhauling and repair in a public dry dock sustained injuries when, in the ordinary course of his work of clearing the scuppers and bilges, he fell into an opening in a deck of the vessel which had been left uncovered. It was not a part of the vessel affected by the repairs. At the time of the accident a number of contractors were under direct contract with the shipowners to make specialist repairs. The seaman sued the shipowners, claiming damages on the ground, inter alia, of breach of regulation 10 of the Shipbuilding Regulations, 1931.[1]

The trial judge found for the plaintiff, and on appeal the shipowners contended that the exceptions to the proviso in the section of the regulations headed "Duties" only came into operation where there was one notional occupier, and in the circumstances of the present case the shipowners owed no duty under regulation 10. They also contended that the plaintiff was not a person upon whom the regulations conferred a civil right of action:—

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[1] Shipbuilding Regulations, 1931: "Duties: It shall be the duty of "the occupier to comply with Parts "I to VIII of these regulations. "Provided that, when a ship is being "repaired in public dry dock, the "person who contracts with the "owner of the ship or with his agent "to execute the work of repair, shall "be deemed to be the occupier for "the purposes of Parts I to VIII and "it shall be his duty to comply with "the said parts, except as follows:— ". . . (*b*) Where the control of the "ship apart from the work of repair "remains with the shipowner, it shall "be the duty of the shipowner, "master, or officer in charge, to pro"vide the protection specified in regu"lation 10 in so far as concerns those "hatches or openings which are not "required to be used for the pur"poses of the repairs, but if such "protection be removed by any per"son or persons in the employment "of the occupier or at his or their "request, the occupier shall be re"sponsible for its replacement as "soon as practicable."

Reg. 10: "All openings in decks "and tank tops shall be securely pro"tected. Such protection shall be "maintained in position and when "necessarily removed in the course "of work shall be replaced as soon "as practicable. . . ."

Held (*per* Singleton and Jenkins L.JJ.), that the only condition to be satisfied in order to bring into operation the proviso and the exceptions thereto contained in the section of the Shipbuilding Regulations, 1931, headed "Duties," was that the ship should be undergoing repair in a public dry dock; that the exceptions (*a*), (*b*) and (*c*) were in terms substantive provisions, each enjoining compliance with some specified regulation or regulations; and that as the ship was undergoing repair in a public dry dock exception (*b*) applied and the shipowners were under a duty to provide the protection specified in regulation 10.

Wilkinson v. *Rea Ltd.* [1941] 1 K.B. 688; [1941] 2 All E.R. 50 applied.

Donovan v. *Cammell Laird & Co.* [1949] 2 All E.R. 82 not followed.

Per Parker L.J. Apart from authority binding upon this court I should, though with diffidence, have come to the conclusion that the appellants' contention was correct. I think that read literally the exceptions are, and can only be, exceptions from the duty imposed by the preceding words on someone who is not but who is deemed to be the occupier of the premises. If there is no such person, then as it seems to me, there is nothing to except; and in such a case the duty to comply with the regulation is either left with the actual occupier (presumably in this case the Mersey Docks and Harbour Board) or no one is fixed with any of the duties under the regulations, and the obligations of all concerned fall to be determined alone under the common law.

Held (per totam curiam), *Wilkinson* v. *Rea Ltd.* was binding on the court.

Young v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293 applied.

Held, further, that the plaintiff, being employed within the factory (i.e., the dry dock) in his normal and regular work, came within the category of persons for whose protection the regulations were intended.

Hartley v. *Mayoh & Co.* [1954] 1 Q.B. 383; [1954] 1 All E.R. 375; and *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402 considered.

Decision of Diplock J. [1956] 1 W.L.R. 1181; [1956] 3 All E.R. 242 affirmed.

APPEAL from Diplock J. (Liverpool Assizes).[2]

The plaintiff, James Bryers, an able seaman, was employed by the defendants, Canadian Pacific Steamships Ltd., as a yeoman carpenter on the *Empress of Scotland*, a vessel owned by them, and which at the time of the accident was undergoing repairs and an annual overhauling in the Gladstone public dry dock at Liverpool. The scuppers and bilge openings of the ship had, while carrying a cargo of grain, been covered with cement and it was the plaintiff's task to remove this covering. He had performed this work in most of the holds of the ship while she was in one of the basins in the port and before she was moved into dry dock. Harland & Wolff Ltd. had undertaken, under direct contract with the defendant shipowners, to carry out general repairs, and some 17 other contractors, also under direct contract, had undertaken to execute specialist repairs, ranging from such matters as the repair of the storeroom locks by Chubb & Sons, to repairs to the steering gear.

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[2] [1956] 1 W.L.R. 1181; [1956] 3 All E.R. 242.

On December 8, 1954, by which time the vessel had been moved into dry dock, the plaintiff received orders to clear the scuppers on "F" deck and the bilges in the well therein. "F" deck was formed by the flat top of the tunnels housing the propeller shafts, and the space between the port and starboard tunnels formed a well about 12 feet deep. The top of the well was usually covered by heavy planks, but at the time in question that covering had been removed, and the plaintiff, while walking to the edge of the well to shine his torch down into the well, apparently slipped and fell into the well and sustained injuries. He claimed damages from the defendant shipowners on the ground, inter alia, of breach of regulation 10 of the Shipbuilding Regulations, 1931.

On June 27, 1956, Diplock J., sitting at Liverpool Assizes, gave judgment for the plaintiff. The defendant shipowners appealed. The plaintiff cross-appealed in respect of the amount of damages awarded and the finding of contributory negligence. Diplock J. had found that the plaintiff was 50 per cent. to blame for the accident, and the damages awarded, reduced by 50 per cent., amounted to £196 13s. 3d.

J. S. Watson Q.C. and *J. Melville Kennan* for the defendants. It is hoped by this appeal to obtain a clarification of the liability of shipowners under regulation 10 of the Shipbuilding Regulations, 1931. There have been a number of decisions but none of them has clarified the legal position. It is submitted that the regulations do not apply to a ship in dry dock, and that if they do they do not apply to the plaintiff, who was not employed by the contractors or "the occupier" of the dry dock. There was in fact no breach of regulation 10, becauce the hatch covers had been left off for the work which the plaintiff was about to do. The section of the regulations which is headed "Duties" provides that "it shall be the duty of the occupier" of the factory to comply with Parts I to VIII of the regulations, which include regulation 10. There follows a proviso that when a ship is being repaired in public dry dock the person who contracts with the owner of the ship to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I to VIII, and it shall be his duty to comply with the said Parts, except as follows:—(*b*) where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner to provide the protection specified in regulation 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs. It is submitted that on the facts of the present case there was no "notional occupier," the repairs being carried out by a number of contractors, and if there was no occupier, then there could be no proviso and no exception to the notional occupier. The case made below was that exception (*b*) came into operation as soon as the ship entered a public dry dock, and Diplock J. found that for the purpose of the regulations the shipowners were caught by exception (*b*). He differed from the decision of Devlin J. in *Donovan* v. *Cammell Laird & Co.*[3] In *Wilkinson* v. *Rea Ltd.*,[4] on which the plaintiff relied, the point that there being no occupier the exception did not apply was not taken or argued.

It is an established principle of the construction of statutes that the whole section or paragraph must be read before attempting to construe any portion of it, and it must be then construed as a whole, each portion throwing light on the rest: see *Jennings* v. *Kelly*.[5] It is not the function of the court to fill in gaps in legislation: *Magor and St. Mellons Rural District Council* v. *Newport Corporation*.[6]

Further, the plaintiff does not fall into the category of persons upon whom the regulations confer a civil right of action. He was not employed by the contractor or occupier and was not a person employed in the processes of the factory.

[SINGLETON L.J. That is giving the go-by to the 1948 Factories Act.]

No. The words must be limited in some way, and in *Hartley* v. *Mayoh & Co.*[7] and *Wingrove* v. *Prestige & Co. Ltd.*[8] it was held that the plaintiff was not a person employed. [*Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper*[9]; *Hartwell* v.

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[3] [1949] 2 All E.R. 82.

[4] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

[5] [1940] A.C. 206; [1939] 4 All E.R. 464.

[6] [1952] A.C. 189; [1951] 2 All E.R. 839.

[7] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

[8] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

[9] [1956] 2 Q.B. 397.

Grayson, Rollo and Clover Docks Ltd.,[10] and *Smith* v. *Cammell Laird & Co.*[11] were also referred to.]

Rose Heilbron Q.C. and *H. L. Lachs* for the plaintiff. *Wilkinson* v. *Rea Ltd.*[12] is on all fours with the present case and was rightly decided. It was decided on facts showing no notional occupier; there was more than one defendant. The fact that there was no argument on the particular point raised by the present case is not a ground for refusing to follow the decision, and it is submitted that this court is bound by *Wilkinson* v. *Rea Ltd.*[12] (see *Morelle Ltd.* v. *Wakeling*[13]). *Hartwell* v. *Grayson, Rollo & Clover Docks Ltd.*[14] and *Wilkinson* v. *Rea Ltd.*[15] were decided on different points and there was not the conflict between them which Devlin J., in *Donovan* v. *Cammell Laird & Co.*,[16] appeared to think existed. That case, so far as it purported not to follow *Wilkinson* v. *Rea Ltd.*,[17] was wrongly decided. Where there is a proviso a section must be construed as a whole (see *Jennings* v. *Kelly*[18]). Here there is no gap which has to be filled. The duty on the shipowner is peremptory. The plaintiff was employed on the ship by the shipowners; he was doing his normal and regular work, and therefore came within the category of persons for whose protection the regulations were made. If in some regulations there is found a limitation, and in other regulations there is no such limitation, then, it is submitted, no such limitation is intended.

[The plaintiff's cross-appeal was not pressed.]

SINGLETON L.J., having stated the facts, continued: It is not easy to put into a few words the view which one forms of this part of the regulations, consisting, as it does, of exceptions to a proviso. The view which I hold is this, that though (*a*), (*b*) and (*c*) appear in the form of exceptions to a proviso, they are general principles stated to be observed by the parties mentioned, whether there be one repairer or whether there be 10 repairers under different contracts with the shipowner. In the first place "the occupier" is charged with duties. The proviso follows, stating that someone other than "the occupier" of the yard may be "the occupier" for certain purposes, "except as "follows." "Except as follows," I believe, means, except for these three heads of general liability on which certain rules can be made and which must be observed. Take (*b*). "Where "the control of the ship apart from the work of repair remains "with the shipowner, it shall be the duty of the shipowner . . . "to provide the protection specified in regulation 10." It is said on behalf of the defendants that no part of (*a*), (*b*) or (*c*) can apply, for they follow a provision that "when a ship is being "repaired in public dry dock, the person who contracts with "the owner of the ship . . . shall be deemed to be the occupier "for the purposes of Parts I to VIII." It is said that there was no such person: there were a number of repairers: therefore the proviso does not apply, and therefore the exceptions to the proviso cannot apply.

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[10] [1947] K.B. 901.

[11] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.

[12] [1941] 1 K.B. 688.

[13] [1955] 2 Q.B. 379, 400; [1955] 1 All E.R. 708.

[14] [1947] K.B. 901.

[15] [1941] 1 K.B. 688.

[16] [1949] 2 All E.R. 82.

[17] [1941] 1 K.B. 688.

[18] [1940] A.C. 206.

I agree with what has been said more than once, that the regulations appear to be unfortunately drafted. But I cannot get out of my mind the fact that (*a*), (*b*) and (*c*) are intended to be three general rules in which particular application of duties can be laid down. Someone ought to be responsible for the duty of complying with regulation 10. It is agreed that someone is if there is but one repairer under contract with the shipowners: but it is said that if there are more repairers than one the duty mentioned under (*b*) does not arise. It would make havoc of the regulations if that is right. Why should the shipowner be responsible if there is only one repairer on the ship and yet not responsible if he has contracted with 10 people to do different repairs on the ship, he himself retaining control of the ship? I cannot find any reason for that; and I am not quite clear in my mind whether, in such circumstances, Mr. Watson's argument is that no one is responsible, or that in the circumstances of this case the Mersey Docks and Harbour Board, the occupiers of the dry dock, are responsible. If it be the latter, again I wholly fail to see why the Dock Board should be responsible for hatch covers upon the ship, inside the ship, if there are a number of repairers under contract with the shipowner and the shipowner should be responsible if there is only one repairer. I cannot think that that is at the back of the regulations. There is good reason for saying that the shipowner shall be responsible for hatch covers and the like if he retains control of the ship, whether he has contracted with one repairer or whether he has contracted for the repairs with a dozen repairers.

The first case to which I should refer is *Wilkinson* v. *Rea Ltd.*,[1] a decision of this court, consisting of Scott, Mackinnon

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[1] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

C. A.
1956

BRYERS
v.
CANADIAN
PACIFIC
STEAMSHIPS
LTD.

Singleton L.J.

and Luxmoore L.JJ. There were a number of defendants. I take this statement of the facts from the headnote: "A ship "was lying in public dry dock while coal was being delivered "by coal merchants for use in the galley, which involved having "a hatch in the galley open. Trifling repairs were also being "done in the galley and elsewhere in the ship by a company "(called the 'repairing company'). While the coal was being "delivered the electric lighting in the galley was temporarily "extinguished at the request of a Lloyd's surveyor, who was "testing the electric lighting equipment. The surveyor had "been accompanied by an employee of the repairing company "who communicated the surveyor's wishes to the ship's engineer "and he extinguished the lights. The plaintiff, an employee "of the repairing company, entered the galley to fetch his tools "while the electric lights were out and he fell down the hatch "and was injured in spite of an attempted warning by an "employee of the coal merchants. The plaintiff, therefore, "brought this action claiming damages for personal injuries "against the coal merchants, the shipowners and the repairing "company." The coal merchants were Rea Ltd., the shipowners were Lamport & Holt, and the repairing company was A. & R. Brown Ltd. "As against the coal merchants the "action succeeded, but as against the shipowners and the "repairing company the action was dismissed and the plaintiff "was ordered to pay their costs."

On appeal by the coal merchants and the plaintiff, it was held, "(1) that the appeal of the coal merchants failed; (2) that "the repairing company were not, by reason of their being "employed to carry out some small repairs in the ship, 'the "'occupier' within the meaning of the provisions headed "'Duties' in the Shipbuilding Regulations, 1931, and had not "had imposed on them the duty under regulation 42 (*a*) of "keeping all parts of the ship efficiently lighted when work "was being done, and consequently that they were not liable "for breach of the regulation, and had not been guilty of any "negligence; (3)"—and this is the important one from the point of view of this appeal—"that the shipowners who, under "exception (*c*) to the provisions under the heading 'Duties,' "were responsible for complying with regulation 42 (*b*), which "required that all approaches to places to which an employee "might be required to proceed in the course of his employment "should be adequately lighted, had, in allowing the lights to be "put out while work was being done without giving any warning, "been guilty of the breach of a statutory duty which was "absolute." The rest does not matter, except that the plaintiff had to pay the costs of those against whom he did not succeed. The headnote further sets out some words of Luxmoore L.J. to which I shall refer in a moment.

In *Wilkinson* v. *Rea Ltd.*[2] the point which is now before the court might have been taken, and it is as clear as anything can be that the groundwork was there if such a point could be raised. In the course of the argument on behalf of the plaintiff, Mackinnon L.J. asked: "Were there other firms carrying out "repairs in the ship?," to which counsel answered "Yes, but "the 'occupier' should be given the meaning of the repairer "at the particular part of the ship. Further" (submitted counsel) "the shipowners were responsible for a breach of regu-"lation 42 (*b*): see exception (*c*) under 'Duties.' Regulation "42 (*b*) provides for the adequate lighting of all approaches "to places to which a person may be required to proceed in the "course of his employment and in particular for the lighting "of dangerous openings. The shipowners committed a statutory "breach of this regulation, for the places to which a workman "is 'required to proceed' includes a place where a workman "goes to get his tools."

Mr. Clothier and Mr. Scholefield Allen appeared for the shipowners in that case, and supported the judgment of Stable J. in the court of first instance, that there was in fact no breach of the regulation in that a proper lighting system had been provided and it had merely been cut off at the time and that was not a breach. This court did not accept that argument, and allowed the appeal against the shipowners. Mr. Clothier's argument dealt with the regulations in full, and so far as I know there could be no difference in this respect between (*a*), (*b*) and (*c*) of the regulation. It was held that there was a duty upon the shipowners, in the circumstances of the case, to comply with regulation 42 (*b*).

Scott L.J., having said that he did not agree altogether with the finding of Stable J. upon the facts, said[3]: "On the plain-"tiff's claims against both these defendants on the ground of "common law negligence the learned judge held that the "plaintiff had not established his case against either"; and with that he agreed. "The shipowners, Lamport & Holt Ltd., "were in fact providing the lighting on board the ship and

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[2] [1941] 1 K.B. 688, 692.

[3] Ibid. 695.

"undoubtedly had expressly or impliedly undertaken with A. & "R. Brown Ltd., their contractors for repairs, to make that "provision, so as to bring them within exception (c) of the "proviso about 'Duties,' and that undertaking must clearly "have meant that the lighting would be continuous throughout "the daily period of the contractors' work." Having stated the facts generally, the Lord Justice said: "If the duty was "absolute, switching off the lights was, in the circumstances "proved in evidence, a breach. It was obviously their duty "to have the illumination on at all material times, and, as the "facts of the case show, it was potentially most dangerous "suddenly to shut off the lights without warning. It made the "means of access to the galley unsafe within regulation 1, "which says: 'Safe means of access shall be provided to all "'parts of the ship to which persons employed may be required "'to proceed in the course of their employment.' It rendered "futile regulation 10, which says: 'All openings in decks and "'tank tops shall be securely protected. Such protection shall "'be maintained in position and when necessarily removed in "'the course of work shall be replaced as soon as practicable.' "In my opinion, regulation 42 (b) is plainly absolute. The "principles of construction which lead to such an interpretation "were explained very clearly by Lord Atkin in *Smith* v. "*Cammell Laird & Co.*[4] and they apply to regulation 42 (b). "The cross-appeal on statutory liability must, therefore, be "allowed against Lamport & Holt Ltd., and judgment entered "for the plaintiff against them with costs here and below."

Mackinnon L.J. agreed; and so did Luxmoore L.J., who said[5]: "With regard to the action against the owners it will "be convenient to consider first whether they were under any "statutory duty towards the plaintiff under the regulations. The "regulations do not contemplate that the owners could be "'occupiers' under the words 'It shall be the duty of the occu-"'pier to comply with Parts I to VIII of these regulations,' "for it has been held in *Smith* v. *Cammell Laird & Co.*[6] that, "on the true construction of the regulations, the subject-matter "of the occupation is a shipbuilding yard. By the definition "already referred to, a shipbuilding yard includes a dry dock "where repairs are being done. It was not, however, argued "that the owners were liable as occupiers of the dry dock. It "was contended that they were liable under the express words

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[4] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.

[5] [1941] 1 K.B. 700.

[6] [1940] A.C. 242.

"of regulation 42 (*b*). [His Lordship read the regulation.] "The duty under this regulation is imposed on the owners by "sub-clause (*c*) of the proviso to the clauses contained in that "part of the regulations included under the heading 'Duties'"; and, a little later, "I can see no reason for not giving the words "of regulation 42 (*b*) their ordinary meaning." I may add that I see no reason for not giving regulation 10 its ordinary meaning; nor do I see any reason why it should not apply to the circumstances of this case.

The decision of this court in *Wilkinson* v. *Rea Ltd.*[7] appears to me to be conclusive of this case. I believe it was binding upon Diplock J. He followed it—though he was not quite sure that it was binding upon him. In my opinion it is binding upon this court. I have already indicated that if the matter had been free from authority I should have formed the same view myself, in order that some effect can be given to the regulations.

In *Hartwell* v. *Grayson, Rollo and Clover Docks Ltd.*[8] it was held that one of several repairers is not the notional "occupier" for the purpose of the regulations. I do not read the argument: it is fully set out in the report. The part which is of importance is at p. 912. Lord Oaksey said[8]: "In my opinion it is not "possible to read the regulations as making one of several "repairers the notional occupier of the dry dock within the "regulations; nor does it make any difference that the repairer "in question is doing repairs which can only be done in a public "dry dock or that he hired the public dry dock. The words in "the proviso under the heading of 'Duties' 'when a ship is being "'repaired' relate to time, and the words 'the work of repair' "relate to the repair which is, in fact, being carried out in the "dry dock. The only authority expressly in point is *Wilkinson* "v. *Rea Ltd. and Others.*[9] Stable J. adopted the view I have "expressed. Luxmoore L.J., with whom Mackinnon L.J. agreed, "appears to have taken the same view. He said: 'In the present "'case A. and R. Brown Ltd., had not agreed with the owners to "'repair the motor vessel *Linnell*, in the Bidston dry dock. They "'had only agreed to do certain parts of the repair work which "'was being carried out on the ship while in that dock. It is, "'therefore, impossible in my judgment to hold that A. & R. "'Brown Ltd. were to be deemed to be the occupiers of the dry "'dock at the time the accident occurred, and they cannot, "'therefore, have been under any statutory duty to the plaintiff.

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[7] [1941] 1 K.B. 688.

[8] [1947] K.B. 901, 910, 912.

[9] [1941] 1 K.B. 688.

"'It follows that, in my judgment, Stable J. was right in dismissing the action against A. and R. Brown Ltd.'"

Lord Oaksey added [10]: "As to the shipowners, I am of opinion that in all the circumstances of this case they were not liable, either under the Shipbuilding Regulations, 1931, or at common law. I have already held that the second defendants were not notional occupiers under the regulations, and, in my opinion, paragraphs (*b*) and (*c*) of the proviso have no application. It is unnecesary to consider how far the Court of Appeal decided in *Wilkinson* v. *Rea Ltd. and Others* [11] that paragraphs (*b*) and (*c*) apply where there is no notional occupier, since, in the present case, as the access hatch in question was required to be used for the purposes of repairs and the shipowners did not provide the lighting, the shipowners are not in breach of them." The court held that it was not necessary to consider the point which is raised in this case.

Mr. Scholefield Allen, on behalf of the shipowners, had raised in argument that the exceptions (*a*), (*b*) and (*c*) could not apply unless there was a single repairer contracting for the whole of the repairs. That was the first time, I think, that this point was raised. The court expressed no opinion upon it. I am inclined to think that the Court of Appeal might then have said that *Wilkinson* v. *Rea Ltd.*[11] at least was binding authority upon the point which is now before us.

The next case to which I desire to refer is *Donovan* v. *Cammell Laird & Co.*[12] That case was heard at Liverpool Assizes on February 14, 15, 16, 17, 18, 21 and 22, and judgment was given on April 12—eight days. I need not go fully into the facts. I should add that when the case of *Hartwell* v. *Grayson, Rollo and Clover Docks Ltd.*[13] was before this court in 1947, the hearing occupied seven days; so that one sees the amount of time which has been spent by judges and by counsel and by others upon points under these regulations; and it appears more clearly from a passage in the judgment of Devlin J. in *Donovan* v. *Cammell Laird & Co.*[14] The result of that case was that the plaintiff's case against the shipowner for breach of the regulation failed, in the circumstances of that case. I do not think it necessary to read the facts: it would only add to the length of this judgment.

The view of Devlin J. upon this part of the case is expressed in his judgment, where he said [14]: "I do not think that the

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[10] [1947] K.B. 914.
[11] [1941] 1 K.B. 688.
[12] [1949] 2 All E.R. 82.
[13] [1947] K.B. 901.
[14] [1949] 2 All E.R. 82, 89.

"shipowner's case on this point is as strong as the similar case "of the dock board. There are in exception (*b*) words which, "applied literally, impose liability on him, but where a fundamental assumption underlying the exception has been vitiated "I cannot feel reasonably sure that a literal application of the "words used would achieve the result intended. Indeed, I "strongly suspect that they would not, for I can see no reason "for making the shipowner responsible for the misdeeds of some "repairers and not of others. Accordingly, I come to the conclusion that in relation to the shipowner's liability also there "is ambiguity and that the liability alleged is not clear. That is "sufficient for the third defendants, and I think that the claim "against them fails. I do not, therefore, need to inquire whether "the willingness of these defendants to identify themselves with "the shipowner is something on which I can safely act within "the principle of *Royster* v. *Cavey*.[15] I appreciate that this "judgment, if it is right, means that in many, perhaps most, "cases of ship-repairing work in dry docks, the regulations will "be a dead letter. This is a result which follows from the application of the principle that legislation of this character to be "effective must be clearly expressed, and I regard it as on the "whole less disturbing than the prospect that workmen, shipowners, repairers and dock owners should have to elucidate "piecemeal and at great expense from one court after another, "as they have started to do in *Wilkinson* v. *Rea* [16] and *Hartwell* "v. *Grayson, Rollo and Clover Docks Co.*,[17] the extent of their "rights and liabilities. A simple alternative, and one which I "hope will commend itself to the Secretary of State if he thinks "it important in the public interest to regulate work in dry "docks, is that he should employ somebody with some knowledge "of the conditions under which that work is done to draft a "more comprehensible section. Meanwhile, and unless and "until that is done, it is satisfactory to reflect that workmen will "continue to enjoy the not inconsiderable degree of protection "which is given to them by the Factories Act, 1937, generally "and by the nature of an employer's duties at common law."

There was no appeal against that judgment. Perhaps it was unnecessary, for the plaintiff had obtained judgment against his employers for breach of duty under the common law and had recovered damages of £4,500 against them. None the less, there were three defendants in that particular case: because of the uncertainty of the position the plaintiff had joined three defendants, and he had to pay the costs of those against whom he failed, which is somewhat of a burden in a case which lasts so long. In 1949 Devlin J. suggested that new regulations might be made. I regret that his advice has not been followed. At the same time, I am inclined to think that the judge took a somewhat restricted view of the regulations. He assumed that the draftsman thought that repairs upon a ship were always done by one company, or firm, of repairers. I do not think that any such assumption should be made. Regulations of this kind are not made without consultation with those who are to be affected by the regulations. One knows that if a statute is to be passed great care is taken to consult with the bodies concerned as to how it will affect different parts of industry; and I have no doubt that the Chamber of Shipping and employers of one kind and another, as well as representatives of dock boards and of trade unions, were consulted upon the form of the regulations of 1931. It appears to me quite likely that it was thought impossible to make regulations covering every case upon a ship where there was a large number of repairers: one could hardly make one responsible for another's misdeeds or omissions. It was much simpler to make regulations of certain kinds if there was only one repairer.

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[15] [1947] K.B. 204; 62 T.L.R. 709; [1946] 2 All E.R. 642.

[16] [1940] 1 K.B. 688.

[17] [1947] K.B. 901.

It may well be that as the regulations stand there are cases in which no one is charged with the duty of carrying out a particular regulation. But the regulations of 1931 state what I have called three general duties and apply them to the persons who are to be charged with them. They appear under exceptions—(*a*) " It shall be the duty of the person having the general " management or control of the public dry dock to comply with " regulations 2 (*b*) and (*c*) and 11 (*c*) so far as they concern those " gangways, uprights, thwarts and planks provided at the dock " by such person; with regulation 42 (*b*) so far as it concerns the " lighting of the quay round the dock; and with regulation 46 " —a general duty. " (*b*) "—the one in question—" Where the " control of the ship apart from the work of repair remains with " the shipowner, it shall be the duty of the shipowner . . . to " provide the protection specified in regulation 10." I am satisfied that that is intended to apply, whether there be one repairer or a dozen repairers, and that to look upon the regulation in another way would deprive it of a great part of the effect which it is intended to have. Again, (*c*), " Where the shipowner pro-" vides the lighting on board the ship it shall be the duty of the "shipowner, master, or officer in charge, to comply with regulation 42 (*b*) so far as regards the lighting on the ship which he "has undertaken to provide." That is a general duty where the shipowner provides the lighting on board. I do not think that that way of interpreting the regulations can be regarded or ought to be regarded as wrong: it gives some effect to them. We ought to give to the regulations, so far as we can, the intention which prima facie they bear. Diplock J., though not satisfied that he was bound by the decision in *Wilkinson* v. *Rea Ltd.*,[18] followed it. I think he was right in so doing. It has been argued in this court that the decision is not binding upon us because the point now taken (and which was taken in the case in 1949) was not argued before the court in *Wilkinson* v. *Rea Ltd.*[18] As I have said, the point was there, if it was to be taken. The circumstances of the case were considered: regulation 42 was applied by the Court of Appeal in a case in which there were different repairers. The case ought to be regarded as binding upon the court in this case. It is no part of the duty of the court to look for a reason for not following a decision if the decision, on the face of it, covers the particular case. If one applies the test laid down by Lord Greene M.R. in *Young* v. *Bristol Aeroplane Co. Ltd.*[19] one finds (as I think) every warrant for the proposition made by Miss Heilbron that the decision in *Wilkinson* v. *Rea Ltd.*[20] governs this case.

One further point is raised by Mr. Watson and by Mr. Kennan on behalf of the shipowners. That is, that the plaintiff who was injured is not a person covered by the regulations and is not entitled to succeed in an action based upon the regulations. The submission made by Mr. Watson was based largely upon the decision of this court in *Hartley* v. *Mayoh & Co.*[21] That was a case in which a fireman was killed, and it was held by Barry J. that the second defendants were liable both at common law and under the Electricity Supply Regulations, 1937, and he gave judgment accordingly. The judgment was upheld in this court; but, it was added, that the regulations did not apply to the circumstances of that case so as to enable the dependants of the man who was killed to succeed in an action for breach of the regulations because he, being a fireman, was not a person covered by the regulations or within the class for whose benefit they were made.

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[18] [1941] 1 K.B. 688.

[19] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[20] [1941] 1 K.B. 688.

[21] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

C. A.
1956

Bryers v. Canadian Pacific Steamships Ltd.

Singleton L.J.

When the position under the Shipbuilding Regulations of 1931 is considered, it is necessary to look at the regulations and to look at the enabling statute, which is the Factory and Workshop Act, 1901. There have been two changes in the statutory provisions since, one by section 60 of the Factories Act, 1937, another by section 12 of the Act of 1948. I do not propose to deal with them other than to say that by another provision in the Act of 1937 the regulations made under the Act of 1901 are continued in force. I do not think that apart from that any good purpose would be served by considering the more recent legislation. The regulations are made under section 79 of the Factory and Workshop Act, 1901: " Where the Secretary of State is satisfied that " any manufacture, machinery, plant, process or description of " manual labour, used in factories or workshops, is dangerous or " injurious to health or dangerous to life or limb, either generally " or in the case of women, children or any other class of persons, " he may certify that manufacture, machinery, plant, process or " description of manual labour to be dangerous; and thereupon " the Secretary of State may, subject to the provisions of this " Act, make such regulations as appear to him to be reasonably " practicable and to meet the necessity of the case."

Under that power the regulations of 1931 were made. They are general in their terms. Mr. Watson submits that they should not apply to a man upon a ship employed by the shipowners. I fail to see why they should not be applied in such a case. It may be that in some cases the shipowner (as I have said in this case) is liable, and I cannot see why he should not be responsible for the protection of his own men working on the ship as for anyone else's men; nor do I see why, if there is a breach of one of these regulations which breach leads to injury to a man, the man on the ship should not have an action in respect of it for breach of that regulation—which, as I think, was intended for the protection of people working within the " factory."

This kind of question was first considered in *Groves* v. *Lord Wimborne.*[22] Certain passages from the judgment of the Court of Appeal in that case were read to the court and considered in *Hartley* v. *Mayoh & Co.*[23] If one looks at the statute under which the regulations were made, one finds, in section 10, a provision with regard to dangerous machinery—" (*c*) All " dangerous parts of the machinery and every part of the mill " gearing must either be securely fenced, or be in such position " or of such construction as to be equally safe to every person

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[22] [1898] 2 Q.B. 402.

[23] [1954] 1 Q.B. 383.

"employed or working in the factory as it would be if it were "securely fenced." The words used are, "every person "employed or working in the factory"; and those words, or words to the same effect, are used in different parts of the Act. In section 14, with regard to the provision of fire escape, I find the words "for the persons employed therein"; and in the course of the argument yesterday reference was made to other sections in which an expression of that kind occurs. If there be made a requirement by the Act in section 10 (*c*) so that something would be safe for "every person employed or working "in the factory," the provision is for the benefit of every person employed or working in the factory; and if the Secretary of State is given power to make regulations under section 79 of the Act, why is he not able to make a regulation for the safety or protection of every person employed or working in the factory?—as was the plaintiff in this case. The "factory" is the shipbuilding yard or dry dock: that is part of the premises in which the ship was. There is nothing limiting that in the regulation itself.

For those reasons, it appears to me that the plaintiff is a person entitled to sue for breach of the statutory duty in respect of regulation 10 of the Shipbuilding Regulations. Consequently, the appeal of the defendants fails.

We heard yesterday the submission of Miss Heilbron, on behalf of the plaintiff, (a) that he was entitled to succeed for breach of a duty at common law, and (b) that the general damages awarded to him were too low; and we indicated that we did not think there was any substance in either of those submissions. The cross-appeal should likewise be dismissed.

Jenkins L.J. I agree; and there is very little that I can usefully add. Diplock J. held that the defendants were in breach of regulation 10 of the Shipbuilding Regulations, 1931, in that they failed to provide the protection required by the regulations over the opening in "F" deck down which the plaintiff fell. That finding was qualified by a decision to the effect that the plaintiff was 50 per cent. to blame—that is to say, that the accident was due in equal proportions to the defendants' breach and the plaintiff's own negligence; and, accordingly, as my Lord has said, damages were awarded which, when reduced by 50 per cent. on account of the plaintiff's contributory negligence, amounted to £196 13s. 3d.

The defendants, as appellants, take the following points. First, it is said that upon the true construction of the part of the regulations headed "Duties," considered in relation to the circumstances of the present case, the defendants were not at the material time under any duty to observe regulation 10. Secondly, it is contended that even if regulation 10 was binding upon the defendants at the material time, the defendants committed no breach of that regulation inasmuch as the covering over the opening in the deck had (in the words of regulation 10) been "necessarily removed in the course of work," and, I suppose one must say, would have been "replaced as soon as practicable." Thirdly, the defendants submit that in any case the plaintiff (who, as my Lord has said, was a yeoman carpenter, a member of the crew of the vessel) was not a person who was entitled to sue for injury sustained by him by reason of a breach of these regulations.

As to the first point, I apologize for referring again to the part of the regulations headed "Duties," but I cannot avoid doing so for the purpose of making my observations intelligible. This part of the regulations is in these terms: "It shall be the duty of the "occupier to comply with Parts I to VIII of these regulations." Pausing there, it is settled by *Smith* v. *Cammell Laird & Co. Ltd.*[24] that the expression "occupier" in these regulations means the occupier of the shipbuilding yard. Having laid down that general principle, that it shall be the duty of the occupier to comply with the parts of the regulations there specified, the "Duties" section of the regulations continues as follows : "Provided that, "when a ship is being repaired in public dry dock, the person who "contracts with the owner of the ship or with his agent to "execute the work of repair, shall be deemed to be the occupier "for the purposes of Parts I to VIII and it shall be his duty "to comply with the said parts, except as follows: . . ." Then follow exceptions (*a*), (*b*) and (*c*), to which my Lord has already referred, but for brevity I can confine myself to (*b*), which is the one exception actually in issue. "(*b*) Where the control "of the ship apart from the work of repair remains with the "shipowner, it shall be the duty of the shipowner, master, or "officer in charge, to provide the protection specified in regula- "tion 10 in so far as concerns those hatches or openings which "are not required to be used for the purposes of the repairs, "but if such protection be removed by any person or persons "in the employment of the occupier or at his or their request, the

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[24] [1940] A.C. 242.

"occupier shall be responsible for its replacement as soon as "practicable." Then, passing over (c), "It shall be the duty "of all persons employed to comply with Part IX of these "regulations."

The ship in this case was being repaired in a public dry dock at the time of the accident; but the work of repair was being done by a number of firms or contractors—I think as many as 17 different firms; at all events they were numerous and were doing all kinds of different tasks, and the case was not one of a single repairer undertaking the whole of the repairs, or of a single repairer doing some of the repairs himself—perhaps the main part of them—and sub-contracting for the rest: there was a number of independent contractors.

That being (very briefly) the state of the facts, the defendants argue thus: " . . . the person who contracts with the owner of "the ship or with his agent to execute the work of repair" must necessarily be one person, or one contractor or repairer, as distinct from a number of separate persons or contractors or repairers. Therefore (the argument proceeds) in the circumstances of the present case there was no person who, as the person contracting to execute the work of repair, could be deemed to be "the "occupier" for the purposes of Parts I to VIII: therefore (it is said) the proviso in this passage in the regulations never came into operation. It is said further, that exceptions (*a*), (*b*) and (*c*), being exceptions on a proviso could not come into operation unless the proviso itself came into operation: accordingly (so proceeds the argument) exception (*b*) never came into operation, so that the defendant company never had laid upon them the duty to comply with regulation 10 imposed by exception (*b*) where applicable.

For my part, I find little assistance in general propositions or maxims of construction such as the maxim relied on here, that the exceptions in this part of the regulations are exceptions on a proviso, and therefore cannot be given any effect unless the proviso takes effect. It seems to me that such maxims, though they sound impressive, more often than not serve only to darken counsel, and for my part I prefer to look at the words themselves and to do my best to see what they mean according to the natural and ordinary meaning of the language used.

Looking at this part of the regulations from that point of view, and without any preconceived ideas about exceptions on provisos, I find that it first lays down a general rule under which the duty of complying with Parts I to VIII of the regulations is laid on "the occupier." It then proceeds to make other provisions for compliance with the regulations in certain events, and the first event which is material is the repair of a ship "in public dry dock": "when a ship is being repaired in public "dry dock," certain consequences are to follow by way of qualification upon the general rule; and the consequences which are to ensue are that it shall be the duty of (to put it shortly) the person contracting to do the repairs (who is to be deemed to be the occupier) to comply with the said parts, with certain exceptions. Then follow the three exceptions. Each of them, as I read it, is in terms a substantive provision enjoining compliance with some specified regulation or regulations—(*b*), in particular, enjoining compliance with regulation 10. The first condition, "when a ship is being repaired in public dry dock," was without doubt fulfilled. Therefore, as I understand the language of this passage, the attribution of duties provided for in that event came into operation and, with the three exceptions mentioned, the person who contracted with the owner of the ship or with his agent to execute the work of repair, was to be deemed to be the occupier and under the duty of complying with Parts I to VIII; while, on the other hand, it became the duty of the defendants to observe regulation 10, with the qualifications mentioned in exception (*b*); for it is not in dispute that, apart from the work of repair, the control of the ship did remain with the defendants, so that the second condition for the application of exception (*b*) was satisfied.

The attribution of duties being of that nature, the point arises that owing to the multiplicity of repairers there was in the result no person who could be deemed to be "the occupier" for the purposes of Parts I to VIII. That circumstance may be a source of difficulty and embarrassment, but I can find nothing in the language of the clause or in any theory that one may form as to the underlying assumptions of fact or of law upon which it is based which makes the lack of any one repairer who can be deemed to be the occupier displace the substantive and (as it seems to me) independent liability of the shipowner under exception (*b*).

It is no doubt true that these provisions are not free from obscurity and may give rise to a number of difficulties in practice; but our task, as I see it, is to read the regulations and construe them as best we can with reference to the particular facts now before the court; and the view I have formed (in agreement with Diplock J.) is that, on the true construction of this part of the regulations, and in the circumstances of this case, the defendants did become subject to a duty to observe regulation 10. Moreover, quite apart from any view of my own, I think that the decision of this court in *Wilkinson* v. *Rea Ltd.*[25] must be regarded as a binding authority to that effect. I should add that it was not contended that the offending opening was left unprotected for the purposes of the repairs: it was agreed that the opening of this hatch, or the leaving of it open, had nothing to do with the repairs. Accordingly, in my view, this first ground of appeal fails.

Then there was the second ground, which can be disposed of very shortly. It was said that in any case regulation 10 was not broken because the protection was "necessarily removed in the "course of work." It seems to me that this contention clearly breaks down on the facts. No good reason whatever was shown why this opening should not have been fully protected at the time when the plaintiff fell down it. The chief officer said this in the last answer in his cross-examination. He was asked: "(Q.) If you had known, would you have ordered them"—that is, the hatch covers—"to be put on? (A.) Yes. I had already, "two days previously, given orders that all hatch-boards should "be put on, and it was with some surprise that I found that the "boards were off the well in No. 5." It seems to me obvious that, although it would be necessary for somebody at some time to go down to remove the plugs (if I may so describe them) which had been used when the ship was carrying a cargo of grain, it was quite unnecessary for the covers to be left off for anything like the period of time for which they were left off. Accordingly, I reject that ground also.

There remains of the grounds of appeal the contention that the plaintiff was not a person entitled to sue for a breach of regulation 10 of the Shipbuilding Regulations. As to that, it seems to me that the question whether a given person who has sustained an injury through some act or omission amounting to a breach of some statutory regulation can recover damages from the person guilty of the breach is a question which depends on the construction of the particular regulation relied on, and on the facts of the particular case. It would be idle to attempt to lay down any general rule. One has only to look at the various special regulations which have been enacted or brought into operation under the Factories Act, 1937, and its predecessors, to see how entirely the matter depends on the construction of the particular regulation. We were referred to a number of passages in various sets of regulations which show that the class or category of persons who are given a right of action may differ from case to case. Thus, it was pointed out to us that in a number of sets of regulations (I think the Docks Regulations, the Yarn Regulations, the Enamelling Regulations, and the Woollen and Worsted Regulations) the expression "person employed" was defined so as to mean a person employed in the particular process or manufacture. Then, in contrast to that, in the Aerated Water Regulations (for instance) one finds the phrase "any person "employed in the works." Then one may get cases in which the expression used is simply "person employed." In the present instance (as my Lord has pointed out) the relevant enabling section is section 79 of the Factory and Workshop Act, 1901. That enabled protective regulations to be made in the widest possible terms without any reference to "persons employed" or other express indication of the limits of the class or category of people entitled to sue for any breach of the regulations whereby they sustain injury; and regulation 10 of the Shipbuilding Regulations is itself in perfectly general terms which do not state or define the class of persons to be protected. There was thus ample power, under the enabling section, to make regulations in regard to shipbuilding—that is to say, the construction and repair of ships in shipbuilding yards—which would enure for the benefit of a person in the situation of the plaintiff: that is to say, a member of the crew of a ship under repair whose duties as a member of the crew required him to be present on the ship during, I suppose, his usual working hours.

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[25] [1941] 1 K.B. 688.

In my view, there is no ground whatever for excluding a person in the plaintiff's situation from the category of persons entitled to sue for a breach of the regulations whereby they are injured, on the principle of *Groves* v. *Lord Wimborne*[26]; and I respectfully adopt the conclusion of Diplock J., who said[27]: "I "can see no reason why in the case of regulation 10, which is "perfectly general in its terms, I should exclude the plaintiff "from the benefit of the regulation on the construction of the "regulation itself; nor, on the *Groves* v. *Lord Wimborne*[28] "principle, can I say that the plaintiff fell outside that category "of persons to whom Parliament intended to give a right of "action for breach of the regulations."

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[26] [1898] 2 Q.B. 402.

[27] [1956] 1 W.L.R. 1181, 1189.

[28] [1898] 2 Q.B. 402.

I respectfully adopt that passage, and I have no comment to make on the way in which the judge dealt with this aspect of the case, except to say that I agree with my Lord in thinking that section 12 of the Act of 1948 cannot well have affected the construction of the Shipbuilding Regulations. I think the material section, so far as the effect of those regulations is concerned, must be the original enabling section, section 79 of the Act of 1901. Section 159 of the Act of 1937 provided for the continuance in force of the regulations in question as if enacted in the Act of 1937 without altering their scope; and I do not think that these regulations were affected either by the use of the words "persons employed in connexion therewith" in section 60 (the enabling section) of the Act of 1937 or by the omission from section 60 of the words "in connexion therewith" after the words "persons employed" effected by section 12 of the Act of 1948. I need not therefore concern myself with the effect of that alteration, as, for the reasons I have stated, I do not think it affects the question which we now have to decide.

For these reasons, which I have stated in deference to the able arguments which have been presented to us, I am of opinion that the appeal fails on all points. I further agree with my Lord that there is no substance in any of the matters dealt with in the cross-appeal; and, accordingly, in my view, both appeal and cross-appeal fail and should be dismissed.

Parker L.J. I have also come to the conclusion that this appeal and cross-appeal should be dismissed, and, save in one respect, for the reasons given by my Lords. Accordingly, the only points on which I desire to add a few words are two points taken by Mr. Watson for the appellant shipowners: first, that the obligation put upon shipowners by exception (*b*) in the section of the Shipbuilding Regulations headed "Duties" does not arise on the facts of this case; and, secondly, that in any event the plaintiff was not within the class of persons for the benefit of whom the regulations were made.

So far as the first point is concerned, I confess that apart from authority binding upon this court, I should—though with diffidence, having regard to the views expressed by my Lords—have come to the conclusion that Mr. Watson's contention was correct. I think that read literally the exceptions are, and can only be, exceptions from the duty imposed by the preceding words on someone who is not but who is deemed to be the occupier of the premises. His duty is to comply with Parts I to

VIII of the regulations, except in certain respects in regard to which those obligations are put on others. If there is (as there is here) no such person, then, as it seems to me, there is nothing to except; and in such a case the duty to comply with the regulation is either left with the actual occupier (who presumably in this case is the Mersey Docks and Harbour Board), a view which Stable J. took in the *Hartwell* case [29]; or, if Devlin J. is right in *Donovan* v. *Cammell Laird & Co. Ltd.*,[30] and the real occupier is removed from any responsibilities whenever the ship is being repaired in public dry dock, then no one is fixed with any of the duties under the regulations, and the obligations of all concerned fall to be determined alone under the common law.

It is in any event, however, unnecessary in the present case to express any opinion as to which of these views is correct; it is enough to say that in my opinion it is impossible to read exceptions (*a*), (*b*) and (*c*) as substantive obligations arising wherever a ship is being repaired in public dry dock: to do so would be to strain the language used, if not to rewrite the proviso. Moreover, it is to be observed (and this is a point which appealed to Devlin J. in *Donovan's* case [30]) that exception (*b*) itself contemplates that there will be an occupier with whom the shipowner would share the duty to comply with regulation 10. Whether or not, however, it is permissible so to strain the language used, I would find it impossible to do so unless thereby a sensible scheme, which must have been intended, would be produced. So far as the present case is concerned, however, to read the words in such a way would only make the shipowner liable to comply partially with regulations 10 and 42; whereas no one (unless, as I have said, it be the Mersey Docks and Harbour Board, who have merely hired out the dock) is fixed with responsibility to comply with the great bulk of the regulations in Parts I to VIII.

Left to myself, therefore, and apart from authority, I would have come to the same conclusion as Devlin J. in *Donovan's* case,[30] and I agree with the view which I think appealed to Lord Oaksey in *Hartwell's* case [31]—that, in the absence of a notional occupier, the shipowner's responsibilities under the exceptions do not arise. It may well be that it was thought impossible to apply the regulations when (as here) the ship is in a public dry dock and there are a mass of independent contractors, and there is a crew, or a skeleton crew, on board. It may, in those circumstances, have been thought that the legal liabilities of all concerned should be determined solely under the common law. Be that as it may, I am satisfied, with my Lords, that the decision of this court in *Wilkinson* v. *Rea Ltd.*[32] is binding upon us, and that the decision in the present case is concluded by that decision.

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[29] [1947] K.B. 901.

[30] [1949] 2 All E.R. 82.

[31] [1947] K.B. 901.

So far as the second point is concerned, it is necessary to look not only at the enabling section under which the regulation was made but at the regulation itself. So far as the enabling section is concerned, it seems to me that it matters not whether one looks at section 79 of the original Act of 1901, or section 60 of the Act of 1937, as amended by the Act of 1948, because in any event, as it seems to me, one arrives at the conclusion that the class of person for whose benefit regulations can be made are all persons employed in the factory. As a matter of construction, if one looks at section 60 of the Act of 1937 I think that the reference to "persons employed" there must mean persons employed in the factory—in this case, the shipbuilding yard. If one looks (as I am inclined to think is the right approach) at section 79 of the Act of 1901, no such words as "persons "employed" are used: the matter is at large. But it is clear that there must be some limit; and reading through the Act of 1901 as a whole I think it becomes clear that the Act is concerned with, and the Secretary of State can make regulations in respect of and affecting, persons employed in the factory or premises.

Mr. Watson seeks to insert a further limitation—either persons employed in the factory by the occupier or persons employed in the factory by whomsoever, but in connexion with the processes or manufacture. So far as the first suggested limitation is concerned, that was dealt with—true, in connexion with sub-contractors—by the Divisional Court in *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper.*[33] It is sufficient for me to say that I agree with the decision in that case and with the view expressed by the Lord Chief Justice in these terms [34]: "It seems to me that one cannot use that decision"—that was *Hartley* v. *Mayoh & Co.*[35]—"to say that these regulations apply "only to the servants of the factory occupier. The test is whether "a person is employed in the factory, not whether he is employed "by the occupier." Streatfeild J. said [36]: "I have come to the

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[32] [1941] 1 K.B. 688.

[33] [1956] 2 Q.B. 397; [1956] 2 All E.R. 722.

[34] [1956] 2 Q.B. 396, 401.

[35] [1954] 1 Q.B. 383.

[36] [1956] 2 Q.B. 396, 403.

"conclusion that they clearly apply to any person who is "employed in the factory whether the direct servant of the "occupier or a servant of an independent contractor so long as "he is employed upon work in that factory, as the dead man "was here." I agree entirely with the views there expressed; and I see no reason for inserting the further limitation that it must be a person employed in the processes.

So much for the enabling power. When one comes to the regulations made under that power, of course it is open to the Secretary of State to cut down, though not enlarge, that class of person, and that further limitation may be introduced either expressly (as in certain regulations to which we were referred, where the persons to be benefited were persons employed in the process) or impliedly—as I think was the case in *Wingrove* v. *Prestige & Co. Ltd.*,[37] a decision of this court in relation to the Building (Safety, Health and Welfare) Regulations.

Looking at regulation 10 of these regulations, I can see no ground whatsoever for implying any limitation. It is true, as Mr. Watson has pointed out, that this man was a seaman going about his ordinary duties as if he had been at sea; but it must be remembered that under the circumstances of this case, and the ship being in dry dock, with a mass of repairers on board, he is being subjected to a wholly different series of risks, and I see no ground for implying that he should be excluded from the class of persons to be benefited. Accordingly, I would dismiss the appeal and the cross-appeal.

Appeal and cross-appeal dismissed.
Leave to appeal granted by House of Lords.[38]

Solicitors: *Hill, Dickinson & Co.; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

A. W. G.

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[37] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

[38] [1956] 1 W.L.R. 1501.

H. L. BOLTON (ENGINEERING) CO. LTD. *v.* T. J. GRAHAM & SONS LTD.

C. A.

1956
Oct. 8, 9.

Denning, Hodson and Morris L.JJ.

[Matter No. M. 1678. OA. 18.]

Landlord and Tenant—Act of 1954—*Business premises* (*Security of Tenure*)—*Landlord's intention to occupy for own purposes—Purchase within five years—Meaning of "purchased"—Interest of landlord merged in freehold landlord's interest within five years of end of current lease—Whether landlord's interest "purchased"—Intention of company—How shown—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*), (2).

Company—Psyche—Intention—Landlord and tenant—Intention to occupy—State of mind of managers is state of mind of company—Landlord and Tenant Act, 1954, *s.* 30 (1) (*g*).

In 1941 a limited company A purchased the freehold of certain land and buildings, and leased them to company B, which in turn sublet part of the premises to company C. In July, 1954, company A as landlords served notice to quit on company B in accordance with the terms of the lease; but that notice was rendered ineffective by the coming into force of the Landlord and Tenant Act, 1954.[1] Company B, however, moved out in February, 1955, surrendering their tenancy to the freehold landlord company A, which thereupon served notice in accordance with the Act on company C. Company C as tenants of business premises claimed the protection of the Act of 1954 and applied for a new tenancy. The landlord company opposed the grant of a new tenancy on the ground, inter alia, that they intended to occupy the holding for their own business within section 30 (1) (*g*).

Before the hearing of that application in the county court there had been no board meeting or other collective decision showing the intention of the landlords to occupy the premises in question. The business of the landlords was customarily managed by their directors, who held only one board meeting a year, but who had in their managerial capacity affirmed such an intention and had taken practical steps to that end.

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[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on "which a landlord may oppose an "application under subsection (1) of "section twenty-four of this Act are "such of the following grounds as "may be stated in the landlord's "notice . . . (*g*) subject as herein-"after provided, that on the termina-"tion of the current tenancy the "landlord intends to occupy the hold-"ing for the purposes, or partly for "the purposes, of a business to be "carried on by him therein, or as "his residence.

"(2) The landlord shall not be "entitled to oppose an application on "the ground specified in paragraph "(*g*) of the last foregoing subsection "if the interest of the landlord, or "an interest which has merged in "that interest and but for the merger "would be the interest of the land-"lord, was purchased or created "after the beginning of the period "of five years which ends with "the termination of the current "tenancy, . . ."

C. A.
1956

H. L. BOLTON (ENGINEERING) CO. LTD. *v.* T. J. GRAHAM & SONS LTD.

On the contentions of the applicant company C, (1) that the surrender by company B of its tenancy constituted a "purchase" of the interest by the landlords within the meaning of section 30 (2) of the Act of 1954 such as to debar the landlords from relying on paragraph (*g*); and (2) that the landlords had not proved the necessary intention to occupy:—

Held, (1) that the word "purchased" in the Act of 1954 was to be construed in the same way as it had been construed in the Rent Restriction Acts to mean "bought for money"; and, accordingly, the interest which had merged in the landlords' freehold interest by operation of law on the surrender of the tenancy by company B was not "purchased" so as to debar the landlords from relying on paragraph (*g*).

Per curiam. The introduction of the word "created" in section 30 (2) indicated that the decision in *Powell* v. *Cleland* [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672 did not apply under the Landlord and Tenant Act, 1954.

(2) That the intention of this company could properly be inferred from the intention of its officers and agents, having regard to the nature of the matter under consideration, the relative position of the directors, and the other relevant acts and circumstances of the case.

Per curiam. The state of mind of directors and managers who represent the directing mind and will of a company and control what it does is the state of mind of the company and is treated by the law as such.

APPEAL from Judge Forbes, sitting at Birmingham County Court.

In 1941, a limited company, T. J. Graham & Sons Ltd., builders' merchants, purchased with vacant possession an area of some six acres of land and the buildings thereon in Queen's Head Road, Handsworth, Birmingham, as a new depot for their business. Owing to war conditions, they were unable to develop it at that date, and, accordingly, let the whole of the land and buildings to another company, Tubes Ltd., under a lease which enabled either side after the war to determine it by three months' notice. Tubes Ltd. used a good deal of the land themselves; but they sublet some of the buildings to a Mr. Bolton, precision engineer, as from 1941, under a lease which, in turn, was determinable by three months' notice. In 1946 Mr. Bolton turned his business into a limited company, H. L. Bolton (Engineering) Co. Ltd., and his subtenancy was taken over by the limited company. The position, therefore, from 1946 to 1954, was that the superior landlord of the whole six acres was T. J. Graham & Sons Ltd.; the tenant of the whole was Tubes Ltd.; the subtenant of part, namely, the buildings, was H. L. Bolton (Engineering) Co. Ltd.

On July 22, 1954, T. J. Graham & Sons Ltd., by their secretary, gave notice to Tubes Ltd. to determine the tenancy on December 25, 1954. Their letter stated: "It is our intention "to commence developing the above site at the early part of "next year, and in these circumstances it is necessary for us to "give you formal notice to determine your tenancy on "December 25 next." That notice would have been effective at common law to have determined the tenancy of Tubes Ltd., but before that notice expired, on October 1, 1954, the Landlord and Tenant Act, 1954,[1] came into operation. The effect of that Act was to render the notice to quit of no effect. The tenancy of Tubes Ltd. was varied by statute so that it could no longer be determined by three months' notice but only by a six-months' notice of termination. A similar statutory variation was imported into the subtenancy between Tubes Ltd. and H. L. Bolton (Engineering) Co. Ltd.

Tubes Ltd., however, did not take advantage of this new statutory variation. They thought that they were bound to go by reason of the existing notice to quit, and they went—not on December 25, 1954, when the notice to quit would expire, but a few weeks later, in January or February, 1955. They gave up the land which they occupied and they handed over everything, so far as they could, to the superior landlords, T. J. Graham & Sons Ltd. As a result of that surrender the intermediate tenancy dropped out. The subtenants, H. L. Bolton (Engineering) Co. Ltd., became direct tenants of the superior landlords, T. J. Graham & Sons Ltd., and claimed that they were entitled to the protection of the Landlord and Tenant Act, 1954, in respect of the buildings which they occupied for their business.

The superior landlords still wished to get possession of the premises, because they wanted to develop the whole site as a depot for their business. Accordingly, on October 25, 1955, T. J. Graham & Sons Ltd., by their secretary, served a notice on H. L. Bolton (Engineering) Co. Ltd. to terminate their tenancy on April 26, 1956. That notice of termination complied with the Act of 1954. At the same time, and in accordance with the Act, they gave notice to the tenants, H. L. Bolton (Engineering) Co. Ltd., that they would oppose an application to the court for the grant of a new tenancy, on the ground "that on termination of "the tenancy we intend to demolish certain parts of the premises "and reconstruct them and to occupy the whole of the premises "for our own purposes." On receipt of that notice, H. L.

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[1] See p. 159, ante.

Bolton (Engineering) Co. Ltd. took the necessary steps to bring the matter to the court, claiming that they were entitled to a new tenancy. In answer, the landlords relied on two provisions of the Act to resist any new tenancy: (1) section 30 (1) (*f*), on the ground that they intended " to demolish or reconstruct the " premises comprised in the holding or a substantial part of those " premises or to carry out substantial work of construction "; and (2) section 30 (1) (*g*), which enables a landlord to resist a new tenancy on the ground " that on the termination of the current " tenancy the landlord intends to occupy the holding for the " purposes, or partly for the purposes, of a business to be carried " on by him therein."

At the hearing in the county court, the tenant applicant company contended that the landlords, being a limited company, were unable to show that they had the necessary intention at any relevant date to establish their right to object to the grant of a new tenancy under section 30 (1) (*f*) or (*g*); and the following further facts became material to that question: The landlords, T. J. Graham & Sons Ltd., were a subsidiary of a big company, the Associated Portland Cement Manufacturing Co. Ltd., which controlled the cement group of companies. T. J. Graham & Sons Ltd. had three directors, two of whom, Mr. Reiss and Mr. Ellison, were also directors of the Cement Marketing Co. Ltd. The third director of T. J. Graham & Sons Ltd. was a local director, a Mr. Tomkinson. Those three directors did not carry on business as a board. They did not have regular board meetings. They only held a board meeting once a year. Each of them individually played some part in the proposed development of this land: but they did not act collectively or as a board. On July 15, 1954, there was a meeting of the managing directors of the cement group of companies. Mr. Reiss, who was a director of T. J. Graham & Sons Ltd., and also of the Cement Marketing Co. Ltd., made a memorandum which was submitted to the meeting. The report of the meeting stated that: " Mr. Reiss's " memorandum was considered and it was resolved to approve " the development of Handsworth Depot, at present owned by " T. J. Graham & Sons Ltd., for use by them and the Cement " Marketing Co. Ltd., by the building of a new warehouse and " office block, the conversion of existing buildings, etc., at a total " cost of £60,000." In consequence of that decision, the notice to quit was given on July 22, 1954, by the secretary of T. J. Graham & Sons Ltd. to Tubes Ltd. Later on, the architect of T. J. Graham & Sons Ltd., Mr. Bloomer, proposed plans showing the nature of the work. He discussed the matter with the directors on several occasions. He saw the three directors about it. The directors met frequently and discussed the development. They did not meet as a board and no vote or minute was taken, but those directors individually considered the matter, and went forward with it as a real project. Indeed, on the adjoining land of the company, they gave instructions for a great deal of work and entered into contracts on behalf of the company without any minute or resolution of the board at all. It was all part of the one development scheme. The directors and the architect were all of one mind about this development and the need to obtain possession of the premises.

When the case came before the county court the position was the same. There had still been no board meeting or minute relevant to the project. But after the first day's hearing, when the case had been adjourned for several days, the directors held a board meeting during the adjournment and passed a resolution in which they gave the history of the matter. They described how the managing directors' committee of the cement group had made a decision for development, and how the local director, Mr. Tomkinson, with the architect, had got out plans; and they affirmed the company's intention to take possession of the site.

The county court judge, in his judgment on June 6, 1956, stated that, in his view, when Tubes Ltd. went out of the premises in January or February, 1955, there had been a surrender by operation of law of their tenancy to the superior landlords, T. J. Graham & Sons Ltd.; but he held that that surrender was not a " purchase " by the landlords of an interest within section 30 (2) of the Act of 1954 [1] such as to debar the landlords from opposing an application on the ground specified in paragraph (*g*) of section 30 (1), because, in his view, " purchase " in the Act of 1954 meant buying for a consideration the equivalent of cash—as had been held in decisions under the Rent Restriction Acts—and did not extend to include an acquisition otherwise than by inheritance. Accordingly, as the landlords' interest was not " purchased or created " within the five-year period ending with the termination of the current tenancy, they were entitled to rely on paragraph (*g*) if they could establish the necessary intention to occupy the holding for their own purposes. The judge held on the facts as found by him (in terms set out in the judgment of Denning L.J. infra) that the landlords had, through their directors, evinced the necessary intention, despite his finding that they had never met as a board nor passed any resolution at

C. A.

1956

H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.

any relevant time recording their intention. He also held that, on the facts, the landlords could not establish the ground of opposition under paragraph (*f*) of section 30 (1), because, though they intended to do considerable work on their own land of which they already had possession, they were not intending to do sufficient work on the building in possession of the tenants to satisfy paragraph (*f*); and that paragraph was accordingly not relied on by the landlords on the subsequent appeal by the tenants.

The tenants appealed.

Michael Albery Q.C. and *Philip Cox* for the tenants. First, the landlords here "purchased" the interest of "the landlord" (as defined in section 44 of the Act of 1954) in February, 1955, that is, within the five-year period, and therefore are precluded by section 30 (2) from relying on paragraph (*g*). The "interest "of the landlord" here is the interest of the former tenants, Tubes Ltd. The effect of their surrender was in law an assignment followed by a merger: see Foa on Landlord and Tenant, 7th ed., p. 611; and section 30 (2) provides expressly for a merger. The surrender and merger transaction was a "purchase"; for "purchased" in this Act should be construed as having its wide technical legal meaning of "acquired otherwise than by operation "of law and in particular by inheritance or escheat" (see Oxford English Dictionary) and not in its prima facie popular meaning of "bought for money." Though in *Powell* v. *Cleland*,[2] following *Baker* v. *Lewis*,[3] the word "purchased" was held to mean "bought," and it is conceded that the policy of the Act of 1954 is similar to that of the Rent Restriction Acts considered in those cases, nevertheless the draftsman of the Act of 1954 appears deliberately to have used language in section 30 (2), by introducing the words "or created," to make plain that the decision in *Powell* v. *Cleland*[4] should be displaced. That case would clearly be decided the other way under this Act. It is not sought to argue that this transaction "created" the interest of the landlord, or that it was a "purchase," if that word has its popular meaning.

Diploma Laundry Ltd. v. *Surrey Timber Co. Ltd.*[5] does not assist here, for though the same point arose before the county court judge in that case and he decided against the present submission on the word "purchased," the Court of Appeal decision was on other grounds, namely, that the interest there in question was not the interest of the "landlord" within the definition in section 44.

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[2] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

[3] [1947] K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 592.

[4] [1948] 1 K.B. 262.

[5] [1955] 2 Q.B. 604; [1955] 2 All E.R. 922.

In this particular context it would lead to results contrary to the policy of subsection 30 (2) if transactions like the present were not covered. The language of this Act is much more technical than that of the Rent Restriction Acts. The word "created" does not import any element of a buying transaction, and it is essential in an Act for the protection of tenants that a tenant should be protected not only against a buying transaction but against a situation in which he could be turned out by a landlord in the position of this landlord, who comes in at so late a date.

Secondly, there was no sufficient evidence on which the judge here could properly find such intention as is necessary to satisfy paragraph (*g*) of section 30 (1). Where the intention to be shown is that of a company, it can only be shown either by a decision of the board collectively; or of the company in general meeting expressly directed to the matter; or, alternatively, by the imputation of intention to an agent of the company on a matter in which that agent was duly authorized by the company to act. The intention of an architect or a secretary or of directors individually is not enough, particularly in a matter of such magnitude, involving the expenditure of some £60,000. The only evidence here was of the meeting in the architect's office in September, 1955, the oral evidence that certain directors of the landlord company intended to go forward with this development, and the contract made in respect of adjoining premises. Until the case was actually in course of being heard there was no resolution of the company giving the directors authority to act on its behalf; and that, as the judge held on the basis of the decision of Danckwerts J. in *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[6] (which has since been reversed on appeal [7]), was too late. Further, the articles of the company show that it is not to be bound except by a meeting of directors as a body. In practice the position depends to some extent on the size of the matter in question. Trivial matters may not require a board resolution; but this was an important matter. That was the approach of this court in *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd.*,[8] in which it was held that there need not be a formal resolution recording the necessary intention; but that case is distinguishable, for the directors there held weekly board meetings at which the proposal to reconstruct had been discussed and agreed.

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[6] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

[7] [1956] 3 W.L.R. 1134.

[8] Court of Appeal Judgments, 1956, No. 217a.

[Denning L.J. We have to decide whether something less than was held sufficient in that case will suffice here?]

Yes; and in any event the intention of an agent, if it is to be attributed to a company, must have been authorized at the relevant date when the notice of opposition was served; ratification of an agent's intention could not be back-dated to October, 1955, for a company cannot keep a sort of locus pœnitentiae under an Act of this nature.

R. O. Wilberforce Q.C. and *Frank Whitworth* for the landlords. "Purchased" was used in the Rent Restriction Act of 1933; in *Powell* v. *Cleland* [9] it was interpreted to mean a transaction involving the payment either of a premium or of consideration, and the argument that it had its old common law meaning was rejected in *Baker* v. *Lewis*.[10] The word has been retained in the Act of 1954: see the Third Schedule as well as section 30 (2); and the legislature must therefore be deemed to have retained it with the same meaning. Though the language of section 30 (2) is not precisely the same as that in the Act of 1933—in particular, the additional words "or created" have been put in to cover the granting of an intermediate lease—the changes are not such as to require the court to adopt the different and technical interpretation of "purchased" in the new Act, which is in pari materia with the Rent Restriction Acts. The policy of section 30 (2) is to guard against persons who provide monetary consideration or the equivalent of money obtaining the interest of the landlord within five years of the end of the current tenancy.

Secondly, the decision in *Diploma Laundry Ltd.* v. *Surrey Timber Co. Ltd.*[11] is relied on to support the submission that the tenancy of Tubes Ltd. was not the relevant interest of the "landlord" as defined by section 44, for it came to an end by a perfectly good common law notice to quit and was only extended by the coming into force of the Act of 1954. In the *Diploma Laundry* case [11] a tenancy came to an end by effluxion of time, and this court held that that tenancy was not an interest of the "landlord" which complied with section 44 because at the relevant date it was due to expire in less than 14 months.

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[9] [1948] 1 K.B. 262.

[10] [1947] K.B. 186.

[11] [1955] 2 Q.B. 604.

Thus even if the transaction here under consideration was a "purchase" it would not come within section 30 (2) to deprive these landlords of the right to rely on paragraph (*g*) of subsection (1), because it would not be an interest of the landlord which complied with section 44.

Thirdly, the acts of the directors of a company may be taken as proof of the company's intention under paragraph (*g*). *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd.*[12] is similar to the present, for there the court took into account not only the company's mode of conducting its business but other material, such as notices to quit, as evidence of intention to reconstruct; similar evidence existed here. The commonsense approach in such cases is that where there is an irregularity in the management of a company which can be cured at any moment, it should be treated as something which can be put right: see *North Hallenbeagle Mining Co., In re Knight's* case,[13] where the court was ready to find the intention of the company in the act of a ministerial officer, although the articles required a resolution; and *Browne* v. *La Trinidad*,[14] in which Lindley L.J. stated the principle to be applied in such circumstances.[15] The ad hoc resolution during the hearing in the present case formally ratified action taken informally before the hearing. That was a quite proper course.

With regard to the date at which the intention must be shown, *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[16] required the county court judge in the present case to hold that the ad hoc resolution was too late; but the question of the proper date is not material here, for the judge found intention proved by this company. The dicta in *Reohorn* v. *Barry Corporation*[17] and *Fleet Electrics Ltd.* v. *Jacey Investments Ltd.*[18] on the proper date were obiter only, and those cases related to proof of intention under paragraph (*f*), where landlords who could not rely on paragraph (*g*) because of the exclusion in section 30 (2) were driven to rely on paragraph (*f*); and the court would therefore be particularly careful to see that the intention to reconstruct was genuine.

Albery Q.C. in reply. The landlords' submission on section 44 is untenable, since it requires the court to ignore a statutory

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[12] Court of Appeal Judgments, 1956, No. 217a.

[13] (1867) L.R. 2 Ch. 321.

[14] (1887) 37 Ch.D. 1; 4 T.L.R. 14.

[15] 37 Ch.D. 1, 17.

[16] [1956] 1 W.L.R. 678.

[17] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

[18] [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99.

C. A.

1956

H. L. Bolton (Engineering) Co. Ltd. *v.* T. J. Graham & Sons Ltd.

provision which prolongs the existence of the tenancy. *Rex* v. *I. C. R. Haulage Co. Ltd.*[19] shows that the act of an agent must be within the scope of his authority. *D'Arcy* v. *Tamar, Kit Hill and Callington Railway Co.*[20] and *In re Haycroft Gold Reduction and Mining Co.*[21] are authorities for the submission that a company must act together and as a board.

Denning L.J., stating the facts set out above, said that it was necessary to trace the title with some particularity. In his view, the coming into force in October, 1954, of the Landlord and Tenant Act, 1954, had the effect of making the notice to quit served by the landlords on Tubes Ltd. on July 22, 1954, of no effect; the tenancy of Tubes Ltd. had been varied by the statute, so that it could no longer be determined by three months' notice but only by a six months' notice of termination; and a similar statutory variation was imported into the subtenancy between Tubes Ltd. and the applicants, H. L. Bolton (Engineering) Co. Ltd. In his Lordship's opinion, the right view was that the common law tenancy subsisted with a statutory variation as to the mode of determination.

His Lordship continued: Before I consider paragraph (*g*) itself I must first turn to subsection (2) of section 30, which says: "The landlord shall not be entitled to oppose an application on the ground specified in paragraph (*g*) of the last "foregoing subsection if the interest of the landlord, or an "interest which has merged in that interest and but for the "merger would be the interest of the landlord, was purchased "or created after the beginning of the period of five years which "ends with the termination of the current tenancy, . . ."

The object of subsection (2) is to prevent an incoming landlord, within the last year or two of a tenancy, from buying up the premises over the head of the tenant and then ejecting the tenant on the ground that he requires it for his own purposes. In order to prevent this, the Act says that the landlord cannot rely on paragraph (*g*) unless he has bought the relevant interest more than five years before the end of the tenancy. In this case the current tenancy ended on April 26, 1956. The landlords bought the freehold interest in 1941, much more than five years before; but the relevant interest here, says Mr. Albery, is not the freehold interest, but the leasehold interest which the landlords acquired when Tubes Ltd. surrendered their tenancy. That was acquired in January or February, 1955—well within the five years. I think that Mr. Albery is right in saying that the leasehold interest of Tubes Ltd. is the relevant interest. It is an interest which has merged in the landlords' freehold, and but for the merger would have been the interest of the landlords. If the landlords " purchased " that interest after the beginning of the five-year period, then the landlords cannot rely on paragraph (*g*). Mr. Albery does not suggest that the leasehold interest was " created " after the five-year period began; indeed, it was extinguished within the five years by the merger; but what he says is that it was " purchased " by the landlords within the five years, because they purchased, he says, in January or February, 1955, when it was surrendered by operation of law.

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[19] [1944] K.B. 551; 60 T.L.R. 399; [1944] 1 All E.R. 691.

[20] (1867) L.R. 2 Exch. 158.

[21] [1900] 2 Ch. 230; 16 T.L.R. 350.

The question therefore is: what is the true meaning of the word " purchased " in subsection (2)? Mr. Albery contends that it has its old technical legal meaning and denotes any acquisition of land other than by descent or escheat; whereas Mr. Wilberforce contends that " purchased " here has its modern popular meaning of buying for money.

In this contest I think that much help is to be gained from the fact that this Act of 1954 is dealing with a similar subject-matter to that of the Rent Restriction Acts; and in the Rent Restriction Acts it is clearly established—by *Baker* v. *Lewis* [1] and *Powell* v. *Cleland* [2]—that " purchased " there is not used in its technical legal sense but is used in its popular sense of buying for money. There are good grounds for thinking that " purchased " is used in the Act of 1954 in the same sense as in the Rent Restriction Acts. For instance, section 12 of the Landlord and Tenant Act, 1954, says that a landlord may regain possession of residential premises on the grounds specified in the Third Schedule, which " correspond . . . to the grounds on which a court may make an " order for possession under the Rent Acts "; and when one turns to the Third Schedule, one finds the grounds stated in almost the self-same words as the Rent Acts. It is specially to be noticed that in the schedule it is said that the court shall not make an order of the kind there specified, " if the interest of " the landlord, or an interest which has merged in that interest " and but for the merger would be the interest of the landlord, " was purchased or created after the twenty-first day of " November, 1950." This provision corresponds to a similar

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[1] [1947] K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 592.

[2] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

C. A.
1956

H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.

Denning L.J.

provision in the Rent Acts. It is clear to my mind that the word "purchased" in the schedule is used in the same sense as it is in the Rent Restriction Acts. So, also, it must be used in the same sense in section 30 (2), which is in similar terms. It means, therefore, "buy for money."

It is true that the words "or created" are added in the Third Schedule and in section 30 (2), whereas they do not appear in the Rent Acts: but the reason for that is apparent. The word "created" was inserted so as to deal with such a case as *Powell* v. *Cleland*.[2] An incoming landlord ought not to be able to avoid the provisions of the Act simply by taking a long lease in his own favour instead of buying the premises. If he takes a newly created interest within the specified time and acquires the position of landlord in that way, then he is barred from relying on paragraph (*g*). The insertion of the word "created" means that the decision in *Powell* v. *Cleland*[2] does not apply to this Act, although no similar word "created" has yet been introduced into the Rent Acts.

This meaning of "purchased" seems to me to conform with the intention of Parliament. It was to prevent a speculator buying up the property and then getting the tenant out on the ground that he required it himself. Parliament did not intend to place a like fetter when the premises came into the landlord's hands by a surrender for no money payment at all. I would agree that if the landlords had bought out Tubes Ltd.—if they had paid a substantial sum of money in return for the surrender—it would have been a purchase. But there is no such feature here; and in the absence of it I am satisfied that the interest which merged was not purchased within the meaning of this Act. My conclusion is, therefore, that "purchased" in this Act has the same meaning as in the Rent Acts. It has its popular meaning of buying for money and not the technical legal meaning of acquisition otherwise than by descent or escheat. T. J. Graham & Son Ltd. did not purchase within the five years and they are therefore not debarred from relying on paragraph (*g*).

The second question is whether the landlords have proved the necessary intention to occupy the holding for their own purposes. This point arises because the landlords are a limited company. Mr. Albery says that there was no meeting of any board of directors to express the landlords' intention, and that therefore the landlords—the company—cannot say that it has the necessary intention.

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[2] [1948] 1 K.B. 262.

[His Lordship stated the material facts on this part of the case and continued:] Mr. Albery says that there must at least be a board meeting. In view of the recent decision of this court in *Austin Reed Ltd.* v. *Royal Assurance Co. Ltd.*,[3] he has to concede that the decision of the board need not formally be recorded in a minute, but he says that, even though not formally recorded, there must be a board meeting by which there is a collective decision, and it is not sufficient that individual directors should individually be of one mind. The judge rejected that contention. He said: "I am told its board only meets once a "year and it seems to me that the mode of conducting its "business is to leave nearly everything to its agents, and so far "as its agents are concerned, I think there is no doubt about "what they mean to do. . . ." Then he went on to say: "So far as the agents of the company, the business managers, "or the directors of the company who manage the business (to "use a more accurate expression) [are concerned], they in their "managerial capacity have certainly affirmed the intention to "occupy the premises in question. An intention, of course, of "a company as we all know cannot be formed in a company; a "company is an abstract being, and the company itself must act "by agents or it must act by its board of directors particularly "in matters of importance. It is not necessary, so far as I "understand it, that any resolution by the board should have "been expressed by a minute, although it ought to be so. However, I do not want to be understood as finding, and I do not "find, that the board of this company has ever met or passed "any resolution that the company intends to occupy these "premises for its own purpose. I do not propose to find that "at any effective time the board of this company has passed a "resolution of the intention to occupy these premises"—now these are the important words—"but the business of the company has been so conducted and the position of the company "is such that matters of this sort, which are business matters, "are dealt with by the agents of the company, the people who "manage the business. Their intention is quite clearly to "occupy these premises as soon as they can. There is another "point to which I think I ought to refer—that is this—instructions had been given to architects to prepare certain plans with

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[3] Court of Appeal Judgments, 1956, No. 217a.

C. A.
1956

H. L. BOLTON (ENGINEERING) CO. LTD.
v.
T. J. GRAHAM & SONS LTD.

Denning L.J.

"regard to alterations to the premises, and these had been "agreed from time to time, plans prepared and submitted to the "managers, the business managers of this company, and I think "it would be difficult for the board of this company, after all "that had been going on, to meet and say 'We will proceed no "'further in this business.' They have already made a contract "in relation to the building and erection of an office block on "adjoining land, all in preparation for occupation by the company of this land, and therefore, on the whole, I think it is "right to find that the intention of the company is to ocupy this "land and they are entitled therefore to succeed in their "opposition on the grounds which they set out in their notice of "October, 1955, namely, on the grounds of paragraph (*g*)."

So the judge has found that this company, through its managers, intend to occupy the premises for their own purposes. Mr. Albery contests this finding, and he has referred us to cases decided in the last century; but I must say that the law on this matter and the approach to it have developed very considerably since then. A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[4] So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty. That is shown by *Rex* v. *I.C.R. Haulage Ltd.*,[5] to which we were referred and in which the court said[6]: "Whether in any particular case there is evidence to go to a jury "that the criminal act of an agent, including his state of mind, "intention, knowledge or belief is the act of the company . . .

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[4] [1915] A.C. 705, 713–714; 31 T.L.R. 294.

[5] [1944] K.B. 551; 60 T.L.R. 399; [1944] 1 All E.R. 691.

[6] [1944] K.B. 551, 559.

"must depend on the nature of the charge, the relative position "of the officer or agent, and the other relevant facts and "circumstances of the case."

So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, I think that, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, the judge was entitled to infer that the intention of the company was to occupy the holding for their own purposes. I am of opinion, therefore, that the judge's decision on this point was right.

I say nothing about the further point raised by Mr. Wilberforce in this matter as to section 44 of the Act, because in the view which I take of the case that does not arise. I therefore find myself in agreement with the judge and would dismiss the appeal.

HODSON L.J. I agree. I also find myself in agreement with the county court judge on both points which were argued before him and which were argued in this court; and I find it unnecessary to add anything to the judgment which my Lord has delivered, with which I agree.

MORRIS L.J. I also agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Stafford Clark & Co. for Faber & Co., Birmingham; J. Unsworth.*

M. M. H.

C. C. C.

REGINA *v.* OWEN AND OTHERS.

1956
May 8, 9,
18.

Donovan J.

C. C. A.

1956
July 23, 24;
Oct. 2.

Lord Goddard C.J.,
Ormerod and
Ashworth JJ.

Criminal Law — Conspiracy — Public mischief — Conspiracy to evade regulation — Relevance of acting "to prejudice the interests of "honest English traders"—Control of Goods (Import Certificates) Order, 1951 (*S.I.* 1951, *No.* 1016).

Criminal Law—Conspiracy—Abroad, to commit acts—Conspiracy to defraud—Conspiracy in England to defraud persons in Germany—Whether an indictable offence in England.

Criminal Law — Forgery — Uttering — Meaning — Forged document enclosed in letter in London and sent to Germany—Whether document uttered in this country—Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 6 (2).

The defendants were charged on an indictment containing six counts. The first two counts charged them with conspiring to commit a common law misdemeanor by conspiring to acquire lead, steel and copper in the Federal Republic of Germany by means of forged documents purporting to show that the metals would be consigned to and not re-exported from the Republic of Ireland, when in fact the metals were to be consigned and sold to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R., thereby evading the provisions of the Control of Goods (Import Certificates) Order, 1951, and acting "to prejudice the interests of honest "English traders in such metals."

The third and fourth counts charged the defendants with a conspiracy to defraud an export control department of the Federal Republic of Germany (known as Z.A.K.) by causing Z.A.K. to grant licences to export certain metals from Germany, by fraudulently representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, the defendants well knowing that the metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

On a motion to quash the first four counts Donovan J., quashing the first two counts, held that the defendants never became amenable to the Order of 1951 because they never imported the goods into the United Kingdom, and that the second unlawful object alleged, namely, acting to the prejudice of honest English traders, although relevant to a charge of conspiracy to effect a public mischief, was not relevant where public mischief was not the unlawful object alleged in the charge.

Donovan J. upheld counts 3 and 4 on the ground that a conspiracy to defraud foreign subjects in a foreign country in such a way that the foreign subjects could sue the tortfeasor in this country, as Z.A.K. could do, was unlawful in English law and an indictable conspiracy in this country.

The jury returned a verdict of Guilty on count 3, and were discharged from giving a verdict on count 4. They returned a verdict of Guilty on count 5, which charged the defendants with a conspiracy to utter forged documents, purporting to be end-user

C. C. C.

1956

REGINA v. OWEN.

certificates, made and given by the Department of Industry and Commerce of the Republic of Ireland and certifying that the metals would be imported into Ireland and not re-exported therefrom, knowing the same to be forged and with intent to defraud. There was evidence from which the jury could infer that the forged end-user certificates were enclosed in letters from a company of which the defendants were directors and sent from London in the normal course of business by post to Germany. On appeal against the convictions on counts 3 and 5:—

Held, (1) that a conspiracy to commit a crime abroad was not indictable in this country unless the contemplated crime was one for which an indictment would lie here; since no offence was committed in Germany for which the defendants could have been indicted in this country, a conspiracy to defraud Z.A.K. was not indictable here; similarly, if it was not indictable to commit a particular crime abroad it would be impossible to hold that it became indictable if that crime also amounted to a civil wrong, and, accordingly, the conviction on count 3 should be quashed.

Reg. v. *Kohn* (1864) 4 F. & F. 68 and *Reg.* v. *Warburton* (1870) L.R. 1 C.C.R. 274 considered.

Held, (2) that the statutory definition of uttering in section 6 (2) of the Forgery Act, 1913, was in sufficiently wide terms to include within its scope a letter containing a forged document; it followed that the uttering alleged in count 5 took place in London and the defendants were properly indicted in this country and the conviction under count 5 should be upheld.

Reg. v. *Finkelstein and Truscovitch* (1886) 16 Cox C.C. 107 followed.

Decision of Donovan J. reversed in part.

TRIAL on indictment.

Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith were charged in the first and second counts of an indictment containing six counts with conspiracy to commit a common law misdemeanor, by conspiring in London and elsewhere together and with Austay London Ltd. and other persons to acquire lead, steel and copper in the Federal Republic of Germany by means of forged documents purporting to show, and by fraudulent representations, that the metals would be consigned to, used in and not re-exported from the Republic of Ireland, to consign and sell the metals to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R., and thereby to evade the provisions of the Control of Goods (Import Certificates) Order, 1951, and to prejudice the interests of honest English traders in such metals.

The third and fourth counts charged the defendants with conspiracy to defraud by conspiring in London and elsewhere together and with Austay London Ltd. and other persons to defraud "Gruppe Zentralle Ausfuhrkontrolle of the Bundesstelle "Fur den Warenverkehr Der Gewerblichen Wirtschaft of the "Federal Republic of Germany" (known as and referred to as Z.A.K.) that was to cause Z.A.K. to grant licences to export certain metals from the Republic of Germany by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

The fifth count charged the defendants and Leslie Eric Hamson with a conspiracy to utter forged documents by conspiring, in London and elsewhere together and with Austay London Ltd. and with other persons, to utter forged documents purporting to be end-user certificates, made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland on behalf of the Minister of that Department, certifying that certain metals to be imported into the Republic would not be re-exported therefrom, knowing the same to be forged and with intent to defraud.

The sixth count charged the defendant Owen with uttering a forged document (an end-user certificate) contrary to section 6 (1) of the Forgery Act, 1913.[1]

After counsel for the Crown had opened, counsel for the defendants moved to quash the first four counts of the indictment. Donovan J. ruled that the first two counts should be quashed and the third and fourth counts upheld. The trial then proceeded.

The jury returned verdicts of Guilty in respect of counts 3, 5 and 6 and were discharged from giving a verdict in respect of count 4. Owen was sentenced to four years' imprisonment and Seth-Smith to three years' imprisonment.

Neville Faulks and *David Hirst* for the Crown.
Christopher Shawcross Q.C. and *Sebag Shaw* for Owen.
Alexander Karmel Q.C. and *Michael Mann* for Seth-Smith.
A. P. Marshall Q.C. and *W. M. Howard* for Hamson.

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[1] Forgery Act, 1913, s. 6: "(1) "Every person who utters any "forged document . . . shall be "guilty of an offence . . . (2) A "person utters a forged document, "seal or die, who, knowing the "same to be forged, and with either "of the intents necessary to constitute the offence of forging the said "document, seal, or die, uses, offers, "publishes, delivers, disposes of, "tenders in payment or in exchange, "exposes for sale or exchange, "exchanges, tenders in evidence, or "puts off the said forged document, "seal or die."

The following cases, in addition to those referred to in the judgment, were cited in argument: *Reg.* v. *Kohn*[2]; *Reg.* v. *Bernard*[3]; *Reg.* v. *Finkelstein and Truscovitch*[4]; *Reg.* v. *Martin*[5]; *Rex* v. *Cooper and Compton*[6]; *Rex* v. *West*[7]; *Machado* v. *Fontes*[8]; *Rex* v. *Whitaker*[9]; *Reg.* v. *Brisac and Scott.*[10]

Cur. adv. vult.

May 18. DONOVAN J., reading his judgment. I now give my reasons for quashing counts 1 and 2 of the indictment in this case, and upholding counts 3 and 4.

Counts 1 and 2 in effect allege a conspiracy to evade the Control of Goods (Import Certificates) Order, 1951. There was at the relevant time no enactment making it an offence to do this, and if a man, considering the rules for the conduct of his affairs laid down by Act of Parliament or by statutory order, decides to conduct those affairs so that the rules do not apply, there is nothing unlawful in simply doing that.

In this case the accused, Owen and Seth-Smith, avoided becoming amenable to the Order of 1951 simply by never importing the goods into the United Kingdom, and never in consequence becoming holders or grantees of an import certificate. To the holder of such a certificate alone did the Order of 1951 apply, and however much the Board of Trade disliked that, the avoidance of its order, it was not entitled to treat it per se as a criminal offence, or as something unlawful.

The other unlawful object alleged in counts 1 and 2 was the prejudice of honest English traders. That was a phrase lifted from the recent case concerning pottery frauds, *Reg.* v. *Newland.*[1] There the charge being conspiracy to effect a public mischief, the consideration that honest English traders were injured by the conspiracy had relevance. In relation to the first two counts in this indictment, where public mischief is not the unlawful object alleged, the phrase "acting to the prejudice of honest English "traders" is really little more than mere declamation.

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[2] (1864) 4 F. & F. 68.

[3] (1858) 1 F. & F. 240.

[4] (1886) 16 Cox C.C. 107.

[5] [1956] 2 Q.B. 272; [1956] 2 All E.R. 86.

[6] 63 T.L.R. 561; [1947] 2 All E.R. 701; 32 Cr.App.R. 102.

[7] [1948] 1 K.B. 709; 64 T.L.R. 241; [1948] 1 All E.R. 718; 32 Cr. App.R. 152.

[8] [1897] 2 Q.B. 231; 13 T.L.R. 407.

[9] [1914] 3 K.B. 1283; 30 T.L.R. 627.

[10] (1803) 4 East 164.

[1] [1954] 1 Q.B. 158; [1953] 2 All E.R. 1067.

I should add that these two counts also allege unlawful means, for example, forged documents and fraudulent representations, but as these representations and alleged forgeries were in turn the alleged unlawful objects specified in the succeeding two counts of the indictment, there was no point in pressing counts 1 and 2 merely because they allege unlawful means.

In those circumstances I quashed them.

Count 3 of the indictment raised the question whether a conspiracy within the jurisdiction to defraud a person outside the jurisdiction, by acts to be committed outside the jurisdiction, is an indictable conspiracy in England.

The law with regard to venue is stated by Lord Watson in the following terms, when delivering the judgment in *Huntington* v. *Attrill*[2]: "The general law upon this point has been "correctly stated by Mr. Justice Story in his 'Conflict of Laws,' "and by other text writers; but their Lordships do not think it "necessary to quote from these authorities in explanation of the "reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when "these have their origin in a foreign country. The rule has "its foundation in the well-recognized principle that crimes, "including in that term all breaches of public law punishable "by pecuniary mulct or otherwise, at the instance of the State "Government, or of some one representing the public, are local "in this sense, that they are only cognizable and punishable in "the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its "object the enforcement by the State, whether directly or "indirectly, of punishment imposed for such breaches by the "lex fori, ought to be admitted in the courts of any other "country."

Seeing that conspiracy is a crime in itself, whether or no the conspirators proceed to put their agreement into effect, then to try in this country a conspiracy having its origin in this country, does not prima facie transgress the rule there stated.

The question is, is there any such transgression involved in treating as indictable here a conspiracy hatched here for the doing of something unlawful abroad? The argument in favour of an affirmative answer derives its chief support from the anomalies to which a negative answer would give rise.

Let it be supposed it is said that persons of the Jewish race in this country, during the persecution of Jews in Germany before the recent war, agreed in this country to get some of their relatives out of Germany by means of forged passports. Would they be indictable here for a criminal conspiracy? Or if members of the Secret Service here, recently much in the news, agreed to send an agent to some foreign country with forged papers, are they similarly indictable?

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[2] [1893] A.C. 150, 155, 156; 8 T.L.R. 341.

I recognize the force of these comparisons, and the difficulties they raise. The legal answer in each case may well be Yes. The practical answer, of course, is that the question would never arise, for no prosecution would ever be launched, or if it were, no conviction ever obtained.

On the other hand, there are anomalies the other way. Suppose two men in this country agree to inflict grievous bodily harm upon a third. At once they commit the crime of conspiracy, even if they subsequently repent. But if they agree to commit the felony in Boulogne while their victim is on a day trip there, and do so, then it is said there is no offence triable here. The actual felony was committed abroad, and so is not triable in England, and the conspirators escape because though the conspiracy was hatched in England the unlawful object was to be effected in Boulogne. Most people would think that as anomalous too.

One can, of course, foresee other difficulties arising out of the rather ambiguous word "unlawful" which may be given a number of meanings, and which may mean one thing here and another thing abroad. Also, there may be a conspiracy in England to do something in France, lawful there but unlawful here. For example, unauthorized public entertainment in a public place for money on a Sunday. It would be odd to prosecute anyone here merely for agreeing to do that in France.

These difficulties make it better that I should not go beyond the actual point I have to decide and try to enunciate some universal principle which could almost inevitably be confounded at once by some particular example. What I have to decide is whether a conspiracy in England to defraud someone in Germany is an indictable conspiracy here. If such an unlawful object were to be effected in England, the conspiracy would clearly be indictable here, for the unlawful object can be a tort as well as a crime: see *Reg.* v. *Aspinall*,[3] and the judgment therein of Brett J.A.

I regard it as unlawful in English law to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country—which I think Z.A.K. could have done, and could still do in the present case.

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[3] (1876) 2 Q.B.D. 48.

Then remembering that it is the agreement which constitutes the crime, whether the unlawful object is effected or not, I cannot on principle see how the conspiracy constituted by such an agreement becomes untriable here simply because the crime or tort has been committed abroad. Logic does not compel such a conclusion. Considerations of the public weal do not compel it either. It would be of no benefit to this country if it became a sanctuary for conspirators, provided only that they concluded their unlawful plots abroad. Anomalies there may be, of course, but they exist whatever the true conclusion.

There is no authority which compels me to hold the kind of conspiracy now under consideration as non-indictable here. There is none the other way either, and this circumstance is strongly relied upon on behalf of the defendants, although the absence of it may tell almost as strongly against their contention as the presence of authority would. It may be that hitherto the matter has been treated as clear. Indeed, I notice that in *Reg.* v. *Warburton*,[4] which was a case of conspiracy here, to defraud a person in Germany by acts to be done there, the validity of the indictment was not challenged. It is true that the question was not discussed, but considering it was the Court of Crown Cases Reserved, and consisted of Cockburn C.J. and Channel and Cleasby BB., Keating and Brett JJ., the point would scarcely have been overlooked.

In any event, on principle I hold that a conspiracy in this country to defraud persons in Germany in the way alleged in this case is indictable here, and accordingly uphold counts 3 and 4.

I might perhaps add, for the sake of the record, that the jury has convicted on count 3, and were discharged from giving a verdict on count 4, for reasons which are immaterial.

Counts 1 and 2 quashed.
Counts 3 and 4 upheld.

Owen appealed against his conviction on counts 3, 5 and 6, and Seth-Smith against his conviction on counts 3 and 5. Both defendants appealed against sentence. Donovan J. had granted a certificate of appeal on the ground that the conviction raised an important point of law not apparently covered by existing authority, namely, whether a conspiracy in England to effect an unlawful object abroad was indictable in England.

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[4] (1870) L.R. 1 C.C.R. 274.

Alexander Karmel Q.C. and *I. C. Baillieu* for Seth-Smith. The issues on count 3 are: (1) Whether an agreement to defraud someone abroad is an indictable conspiracy in this country? If so, what are the limitations? Since this country will not enforce the fiscal laws of another country, some limits must be imposed. (2) Whether it was a proper direction on the evidence that Z.A.K. were defrauded? Z.A.K. did not have any property in the goods and, accordingly, it is submitted that they were only deceived. The questions that arise in respect of count 5 are whether the agreement to utter a forged document is an indictable conspiracy, and whether the judge misdirected the jury as to what a forged document was.

With regard, first, to count 3 it is not a crime to agree in this country to commit an offence abroad. It is not an illegal agreement to agree to do something which is not contrary to the law of this land. Researches have failed to reveal any authority where a conspiracy to effect a crime abroad which does not affect this country, such as treason, has been held to be indictable here. In *Reg.* v. *Bernard*,[1] in which the defendant was charged with being an accessory before the fact to murder of persons in France, the jury acquitted, so that the point of law was never actually decided. Section 4 (1) of the Offences against the Person Act, 1861, which was enacted after *Bernard's* case,[1] created a new offence, and made it an offence to conspire in this country to commit a murder abroad. Conspiracy being a common law misdemeanor, there is no limit to the sentence which the court can impose. If there is a conspiracy such as Donovan J. found, the sentence could be life imprisonment, whereas the sentence for conspiracy to murder by virtue of section 4 (1) is only 10 years. In *Reg.* v. *Kohn* [2] Willes J. told the jury that the point which arose in *Bernard's* case [3] did not arise because it was contemplated that the offence might be committed within the jurisdiction. The view of Willes J.[4] appeared to be that if the agreement had been to destroy the ship at sea out of the jurisdiction, it would not have been an indictable conspiracy. The important thing about *Reg.* v. *Warburton* [5] is that there is no mention of matters arising out of the jurisdiction; that case was concerned with a

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[1] (1858) 1 F. & F. 240.
[2] (1864) 4 F. & F. 68, 72.
[3] 1 F. & F. 240.
[4] 4 F. & F. 68, 72.
[5] (1870) L.R. 1 C.C.R. 274.

C. C. A.
1956

REGINA
v.
OWEN.

partnership in England. The parties to be defrauded were in this country although the acts were to be done abroad. The unlawful object of the conspiracy must take place in this country for the conspiracy to be indictable here. [Reference was made to Wright on the Law of Criminal Conspiracies, at pp. 14, 34, 72 et seq.; *Reg.* v. *Aspinall*[6]; *Huntington* v. *Attrill*[7]; *Mulcahy* v. *The Queen,*[8] and *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria.*[9]] In Kenny's Outlines of Criminal Law, 16th ed., at p. 446, para. 645, it is doubted whether a man in England commits an offence against English law by conspiring to commit a crime abroad.

On the point whether Z.A.K. were defrauded or deceived it is conceded that if Z.A.K. acted to their detriment, they would have been defrauded, but they did not so act. To defraud means by deceit to induce a man to act to his injury: *per* Buckley J. in *In re London and Globe Finance Corporation Ltd.*[10] There was no evidence that Z.A.K. acted to their injury. *Rex* v. *Bassey,*[11] which is relied on by the Crown, in no way conflicts with Buckley J.'s [12] definition of defrauding and deceiving.

The arguments against the conspiracy alleged in count 3 being indictable in this country apply equally to count 5. With regard to the uttering of the documents there was no evidence that they were uttered in this country. They were brought from Dublin to London by hand, but whether they were sent to Germany or taken there by Owen is not known.

[LORD GODDARD C.J. If the certificates were sent from London, it would be a conspiracy to utter. The moment the documents are sent, that is the overt act of uttering. Even if Owen took them himself, the overt act occurred when he started to take them.]

There does not appear to be any authority in which it has been held that carrying a document is uttering it.

Neil Lawson Q.C. and *Sebag Shaw* for Owen. In respect of count 3 Donovan J. dealt with the matter on the basis that the conspiracy to carry out an unlawful act abroad was indictable here on the ground that the unlawful act was a civil wrong, but if Z.A.K. brought an action in this country, they would have to prove damage, which they would be unable to do. It is not every conspiracy to commit an unlawful act in this country which is indictable here, e.g., an agreement to trespass. There is no authority in which it has been held that a conspiracy to injure by cheating or defrauding is indictable here. The whole basis of *Reg.* v. *Aspinall*[13] was that it was a conspiracy against the Queen's subjects involving a disturbance of the Queen's peace. [Reference was made to *Reg.* v. *Brisac and Scott*[14] and *Foster* v. *Driscoll*.[15]]

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[6] (1876) 2 Q.B.D. 48.

[7] [1893] A.C. 150; 8 T.L.R. 341.

[8] (1868) L.R. 3 H.L. 306.

[9] [1935] 1 K.B. 140; 50 T.L.R. 284.

[10] [1903] 1 Ch. 728, 732; 19 T.L.R. 314.

[11] (1931) 47 T.L.R. 222.

[12] [1903] 1 Ch. 728, 732.

With reference to count 5 it is quite clear that Donovan J. dealt with the matter on the basis that what the jury had to consider was a conspiracy to utter in Germany.

[LORD GODDARD C.J. Suppose we give effect to the argument advanced on behalf of Seth-Smith on count 3, if there was an uttering in this country, we should apply the proviso because it was all part of the same transaction.]

There might be a conspiracy to utter, but the question is whether the documents were to be uttered in Germany or in England. There are three "utterings" to be considered. The first uttering would be between the conspirators themselves, which is not an uttering for the purpose of the Forgery Act, 1913, and is not indictable. The second uttering would be by post from London to Germany. The third uttering took place in Germany, and for the reasons submitted in respect of count 3 would not be indictable in this country. The question that arises is whether the defendants conspired to utter the forged documents in England. To put a forged document into the post is not uttering it, because one is not publishing and, accordingly, it is submitted that the second uttering is not indictable. The definition of uttering in section 6 (2) of the Forgery Act, 1913, is wide but it does not include posting; the descriptive words in that section should be related to the natural meaning of uttering. The fact that Parliament expressly makes it an offence to post a libel indicates that "posting" would have been expressly included in section 6 (2) had it been so intended. *Reg.* v. *Finkelstein and Truscovitch*[16] appears to be contrary to the defendants' contentions, but it is submitted that that decision is wrong. The earlier authorities on uttering, which assist by indicating to what extent the statute altered the common law position, show that the court was always looking for evidence amounting to publication: *Reg.* v. *Taylor*[17] and *Rex* v. *Giles.*[18] The document has to be put into circulation; if one throws it away, that is not uttering. The only conspiracy alleged in count 5 is the uttering of forged documents in Germany, and that is an unlawful act abroad and therefore is not indictable here. It would be wrong for the court to find that the jury, in the absence of a direction, could take the view that there was the contemplation of uttering in England.

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[13] 2 Q.B.D. 48.

[14] (1803) 4 East 164.

[15] [1929] 1 K.B. 470; 45 T.L.R. 185.

[16] (1886) 16 Cox C.C. 107.

[17] (1865) 4 F. & F. 511.

As to count 6, a forged certificate was enclosed in a letter which Owen is said to have written. It is suggested that the jury were entitled to draw the inference that it was posted in London. The only question that arises is where the uttering took place. Uttering in Germany would have been insufficient and mere posting in England is not enough.

Neville Faulks and *David Hirst* for the Crown. The prosecution puts its case regarding count 3 in three ways: (1) To agree in this country to commit abroad a tort by the law of this country is an indictable conspiracy in this country; (2) an analogous argument, based on *Reg.* v. *Kohn,*[19] to the effect that to conspire to do an act abroad which if done in this country would be criminal is indictable in this country: see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed. at p. 1481, under venue; (3) to agree in this country to do abroad something which if done in this country would be contra bonos mores is similarly criminally indictable.

The first argument is the one on which Donovan J. based his judgment, and that is adopted by the Crown. To agree in England to commit a tort in England is indictable here so long as the agreement is to do an act of fraud or corruption: *Rex* v. *Whitaker.*[20]

On the point of the distinction between fraud and deceit, the whole matter was considered in *Reg.* v. *Newland,*[21] in which *Rex* v. *Bassey*[22] was quoted. Z.A.K. were defrauded because it was their right and duty to refuse to issue licences for the export of metals to Eastern European countries. They were defrauded because they were induced to part with a licence, and an action would lie in this country for a declaration for the return of the licence and 20s. nominal damages. The word "injury" in Buckley J.'s judgment in *In re London and Globe Finance Corporation Ltd.*[23] does not mean substantial injury. It is quite sufficient to show that Z.A.K. parted with a document. The present case is indistinguishable from *Reg.* v. *Newland.*[24]

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[18] (1827) 1 Mood.C.C. 166.

[19] 4 F. & F. 68.

[20] [1914] 3 K.B. 1283; 30 T.L.R. 627.

[21] [1954] 1 Q.B. 158; [1953] 2 All E.R. 1067.

[22] 47 T.L.R. 222.

[23] [1903] 1 Ch. 728, 733.

If one agrees in England to do overt acts abroad which result in damage to someone in England, that is indictable here. *Machado* v. *Fontes*[25] shows that a tort committed abroad which is a tort in this country and not justifiable abroad is actionable in this country. The logical conclusion to draw from that is that if one agrees to commit overt acts abroad to defraud someone in this country, that must be indictable here. The present case is teeming with overt acts. When one reads *Machado* v. *Fontes*[25] and *Reg.* v. *Warburton*[26] together it does not make any difference whether the defrauded person is in England or abroad. Those two cases read together support the Crown's submission. The indictable conspiracy is the agreement to do something which is tortious in this country.

[Lord Goddard C.J. It may be that the true rule is that it is an offence to conspire in this country to do an act which, if done in this country, would be punishable here. There are certain offences, like murder, bigamy, foreign enlistment, which if committed abroad are punishable here. But if it would not be a crime here how could it be a conspiracy?]

The crime is the conspiracy. The question whether it is a conspiracy to commit a crime is based on *Kohn.*[27]

[Lord Goddard C.J. It is quite obvious from *Kohn*[27] that if it had been a conspiracy to scuttle on the high seas Willes J. would not have left it to the jury.]

That is not accepted. Roscoe's Criminal Evidence, 16th ed., p. 211, suggests that Willes J. told the jury that if the agreement was to scuttle the ship, whether on the high seas or in port, the defendants were guilty. An agreement in this country to do something abroad which, if done in England, would be a crime, is clearly an indictable conspiracy in this country, although it does lead to difficulties in the gambling cases. After the difficulties raised by the Orsini bombs conspiracy (*Reg.* v. *Bernard*[28]) it was thought best to make the matter clear, and the fact that section 4 appears in the Offences against the Person Act, 1861, is not therefore conclusive.

The third limb of the argument is based on contra bonos mores. The English courts will not enforce local penal laws, but murder and theft are universal crimes: *Reg.* v. *Martin.*[29] One cannot for this purpose distinguish fraud from murder and theft, and therefore an agreement to commit abroad one of those universal crimes is indictable here. In Halsbury's Laws of England, 3rd ed., vol. 10, p. 313, it is stated: "The gist of the "offence of criminal conspiracy may consist in the agreement to "do an act contrary to public morals or decency, although the "act may not of itself be criminal if done by only one person. "A conspiracy to cheat and defraud is criminal, even though "the act which it is agreed to do is not criminal if done by one "person."

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[24] [1954] 1 Q.B. 158.

[25] [1897] 2 Q.B. 231; 13 T.L.R. 407.

[26] L.R. 1 C.C.R. 274.

[27] 4 F. & F. 68.

[28] 1 F. & F. 240.

On count 5 three utterings were proved, two to manufacturers and one to Z.A.K. The facts in the present case constitute an "uttering" under section 6 (2) of the Forgery Act, 1913. *Reg.* v. *Taylor*[30] supports that proposition and is in favour of the Crown's submission on this point.

[He was stopped.]

Karmel in reply. In *Reg.* v. *Newland*[31] the manufacturers were deprived of their goods. There is no evidence in the present case that German manufacturers were deprived of their goods. If it be right that there was no fraud, but only deceit, the convictions cannot stand.

Cur. adv. vult.

Oct. 2. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued: The conspiracy and the method adopted to effect it can be quite shortly stated. The German Government would not grant licences for the export of strategic metals to Eastern European countries. The appellants were directors of a company called Austay London Ltd., and Seth-Smith was chairman of an Irish company called Smith Miller (Eire) Ltd. Austay Ltd. bought metal in Germany and the appellants put false documents before Z.A.K., the licensing authority of the German Government, purporting to show that the metal would be exported only to Ireland, whereas, in fact, it was to be exported to "Iron Curtain" countries. They also obtained through Smith Miller (Eire) Ltd. and presented to Z.A.K. documents which are known as end-user certificates, which purported to be given by a Government Department of Eire certifying that the metal would not be exported from but would be used in Ireland. These documents, six of which were proved in evidence, were bought for a substantial sum of money from a person who, apparently, carried on a business in Dublin of supplying forged certificates.

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[29] [1956] 2 Q.B. 272, 286; [1956] 2 All E.R. 86.

[30] 4 F. & F. 511.

[31] [1954] 1 Q.B. 158.

It is not altogether easy to appreciate what offence it was intended to allege in count 3, as distinct from that alleged in count 5. The evidence would seem to be identical on both counts. Presumably, count 3 was intended to refer to the fraudulent representations as to the destination of the goods and to the false shipping documents used in support, while count 5 is confined to the forged end-user certificates subsequently produced in support of the earlier representations. With regard to count 3 the court has felt considerable doubt as to whether it was right to charge an intent to defraud and not an intent to deceive. According to the well-known definition given by Buckley J. in *In re London and Globe Finance Corporation Ltd.*,[1] to deceive is by falsehood to induce a state of mind and to defraud is by deceit to induce a course of action, that is, to induce a man to act to his injury; in other words, to deprive by deceit. It may well be doubted whether a Government Department can be said to act to its injury merely by issuing a certificate which it would not have granted had the true facts been known. Certainly it has not been deprived of anything. It is, however, unnecessary to decide this point because of the view the court has formed on the main question raised by the certificate of appeal granted by the judge.

The case put forward by the prosecution on count 3 was that a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country, and the case was argued both at the trial and in this court on that footing. This question has never been authoritatively decided, though it has, on different occasions, been raised, and has been the subject of discussion by text-writers of authority and now falls for express decision. There is no doubt that a conspiracy is indictable here if an agreement is made within the jurisdiction to do an unlawful act, or to do a lawful act by unlawful means, in either case within the jurisdiction, whether the agreement is carried into effect or not. As soon as agreement is reached the very plot is an act itself and is indictable: *Mulcahy* v. *The Queen*.[2] The question, however, remains whether it is indictable if the unlawful act is to be effected outside the jursdiction. Another principle of

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[1] [1903] 1 Ch. 728, 732, 733; 19 T.L.R. 314.

[2] (1868) L.R. 3 H.L. 306.

English law is that, apart from express statutory provision, offences committed by British subjects out of England are not punishable here by the criminal law. This matter was discussed and the authorities considered in the recent case of *Reg.* v. *Page*,[3] and we need not further enlarge upon it. The only statutory provision relating to conspiracy to commit a crime is section 4 of the Offences against the Person Act, 1861, which deals with conspiracy in this country to murder any person abroad whether within the Queen's dominions or not, and whether the person is or is not a subject of the Queen, and such a conspiracy is a misdemeanor punishable with a maximum of 10 years' imprisonment. Now, certainly since the Act of 33 Hen. 8, c. 23, a British subject had been indictable in this country for murder committed abroad, and section 7 of the Offences against the Person Act, 1828, 9 Geo. 4, c. 31, expressly provided for the trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without. It follows that being an accessory to murder abroad or conspiracy to murder abroad is indictable in this country. Section 4 of the Act of 1861 did not therefore add to or alter the common law on the subject; it provided a special penalty and made it clear that a conspiracy by anyone in this country was indictable. The section in fact follows closely, except as to penalty, the Conspiracy to Murder Bill which had been introduced in 1858 by Lord Palmerston in consequence of what was known as the Orsini bombs conspiracy. The Bill sought to make the offence a felony punishable with a maximum of penal servitude for life and also to settle an acute controversy which had arisen as to whether it was an offence for foreigners to conspire in this country to commit murder abroad. The Attorney-General, Sir Richard Bethell, afterwards Lord Westbury L.C., contended that it was not, but this opinion was strenuously opposed by Lord Campbell. The Bill was defeated in February of that year on second reading, and led to the fall of the Government. In the following April, Simon Bernard[4] was charged with being an accessory to the murder of persons in France, and Lord Campbell C.J. in his charge to the grand jury referred to the Act of George 4 cited above and laid down that foreigners who became in this country accessories to murder abroad were just as responsible to the law as British subjects would be. The case is fully reported, including the charge of

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[3] [1954] 1 Q.B. 170; 37 Cr.App.R. 189; [1953] 2 All E.R. 1355.

[4] (1858) 1 F. & F. 240; 8 State Tr. N.S. 887.

Lord Campbell C.J.,[5] when he intimated that the question would if necessary be reserved for the consideration of the 15 judges, but as the verdict was one of acquittal this could not be done. In the same volume of the State Trials is the report of *Reg.* v. *Tchorzewski*,[6] where the defendant was charged with publishing a seditious libel in French with the object of inciting people in France to kill the Emperor. The Attorney-General, who by this time was Sir Fitzroy Kelly, elected to offer no evidence, in spite of Lord Campbell's evident disapproval of that course. The Lord Chief Justice [7] took the opportunity of saying that he hoped foreigners resident here would remember that it is a crime for a British subject or a foreigner resident here to conspire for the commission of a crime in a foreign country, but this must be regarded as no more than an obiter dictum; the case had not been argued and cannot rank as a decision and does not seem ever to have been followed or even quoted. It is in our opinion clear that section 4 of the Act of 1861 did not create a new offence. It merely dealt with the sentence applicable to an already existing offence. Accordingly, there is no ground for arguing that as Parliament had expressly provided for the case of conspiracy to murder abroad it followed by applying the maxim "expressio unius exclusio alterius" that it was only in relation to murder that a conspiracy to commit a crime abroad was indictable in this country. Both before and since the Act of 1861 the question has been whether the substantive offence alleged in the conspiracy was triable here.

We now turn to *Reg.* v. *Kohn.*[8] The defendant, a Prussian and captain of a Prussian merchant ship, was indicted for a conspiracy at Ramsgate with the owner and mate to cast away and destroy the ship to the prejudice of the underwriters. The ship was in fact sunk far from the English coast and so out of the jurisdiction. Willes J.[9] directed the jury that a conspiracy in this country to commit the offence was criminal by our law, but that the case did not raise the point which arose in *Bernard's* case [10] as to a conspiracy limited to a criminal offence to be committed abroad, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate which was within the jurisdiction; and he concluded his charge by saying that for the principal offence, that is, the casting away, the defendant could not be indicted here as he was a foreigner, the ship was foreign and the offence was committed on the high seas, but the question was whether there was a conspiracy here to destroy the ship whether at sea or in port. Willes J. is, however, reported as saying that the offence of conspiracy would be committed by persons conspiring together to commit an unlawful act to the prejudice of others if the conspiracy was in this country though the overt acts were abroad. The case is not very satisfactorily reported, but taking the report together with the note of the reporter it seems that the judge meant to lay down (1) that an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (2) that to conspire to scuttle out of the jurisdiction is not indictable; but that (3) to conspire to scuttle whether the ship should be within or without the jurisdiction is indictable as the ship might be scuttled in an English port or within English territorial waters; (4) that to conspire to injure persons within the jurisdiction by doing an act out of the jurisdiction is indictable. This would seem to be the opinion also of Sir James Fitzjames Stephen, though he says in his History of the Criminal Law, Vol. 2, p. 13, that he abstains from giving a decided opinion because the question as to conspiracy to commit a crime abroad remains unsettled and may be raised judicially. He puts as a strong argument that the criminal law of England does not deal with crimes committed abroad at all, and submits that if incitement to commit crimes abroad is to be made criminal it should be done by legislation and not judicial decision. In that well-known and authoritative work, Wright on the Law of Criminal Conspiracies, the author, afterwards a judge of the Queen's Bench Division, points out that the modern law of conspiracy is in truth merely an extension of the law of attempts, and, at p. 74, after referring to *Kohn*,[11] says that if the contemplated act when done will not by reason of the place and the nationality of the actors be punishable here, there would be much difficulty in holding criminal an agreement here for doing that which, when done, would not be a crime against our laws. Now, clearly if two Englishmen commit a burglary in France they cannot be indicted for that crime in England. It would certainly seem illogical to hold that, by agreeing to go to France to commit the offence, they are guilty of a crime against our laws. But there are certain acts which by statute are crimes punishable in England wherever committed. Instances are murder, bigamy, offences against the Foreign Enlistment Act, 1870, the Official Secrets Act, 1911, and the Merchant Shipping Act, 1894. The statutory exceptions are all collected in

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[5] 8 State Tr.N.S. 887, 893 et seq.

[6] (1858) 8 State Tr.N.S. 1091.

[7] Ibid. 1095.

[8] (1864) 4 F. & F. 68.

[9] Ibid. 72.

[10] 1 F. & F. 240.

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[11] 4 F. & F. 68.

Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 29 et seq. In our opinion the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here, because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For instance, if two persons agreed here to stage a sham burglary abroad in order to collect insurances from English underwriters the conspiracy would be indictable here though the overt act was to be done abroad, because if the plot were carried out the obtaining or attempting to obtain the insurance money would be clearly indictable. In the present case the plot, though formed here, was carried out in Germany and assuming, as we have, that Z.A.K. were defrauded and not only deceived, the persons defrauded were Germans in Germany. In our opinion no offence was committed in Germany for which the appellants could have been indicted in England and consequently in our opinion the conspiracy is not indictable.

It was further argued that a conspiracy to effect a civil wrong is indictable and that the evidence disclosed a fraud for which Z.A.K. could have sued in this country. It is no doubt true that a conspiracy to commit a civil wrong in this country is indictable even though the wrong has not been effected; but we know of no case where it has been held that a conspiracy to injure a person abroad is indictable here though it may be that it is if some interest of his in this country is affected. Much reliance was placed below on *Reg.* v. *Warburton*,[12] and it is necessary, therefore, to see exactly what that case did decide. The facts were that there was a partnership consisting of Warburton and one Lister who traded in the West Riding and also had a branch business in Saxony carried on there by a manager. Warburton conspired with the manager and a person residing at Cologne to fabricate documents and accounts there with the object of depriving Lister of his proper share in the partnership. These documents and accounts were to be produced to Lister in this country and would have constituted false and fraudulent representations as to what was due to him with the object of injuring or depriving him of his equitable rights in the partnership. While the material was fabricated abroad, the fraud would have been carried out here, and it was never even suggested in argument that because the conspiracy took place abroad that could have any bearing on the matter. The actual decision seems to have been that a conspiracy to injure was indictable though the injury was to equitable and not legal rights. If it is not indictable to conspire to commit a particular crime abroad it would be impossible to hold that it becomes indictable if that crime also amounts to a civil wrong. Moreover, we are unable to see that in this case Z.A.K. would have had a cause of action in this country. Conspiracy or deceit alone gives no cause of action. As in all actions on the case it is damage which is the gist of the action. Z.A.K. were deprived of nothing; they were tricked into giving a licence which may well have been a crime in Germany, but we do not see that they suffered any damage for which an action would lie in this country. In our opinion the conviction on count 3 must be quashed on the ground that the offence which the appellants conspired to commit was one to be committed abroad and one which would not have been indictable in England.

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[12] (1870) L.R. 1 C.C.R. 274.

We now pass to count 5. This count charged the two appellants and Hamson with conspiring together and with Austay London Ltd. and with other persons unknown to utter forged documents purporting to be end-user certificates knowing the same to be forged and with intent to defraud. All three men were convicted.

The first point taken on behalf of the appellants was similar to that taken in regard to count 3, namely, that the offence which the appellants conspired to commit was one to be committed abroad and would not have been indictable in England. The alleged object of the conspiracy was the uttering of forged documents knowing them to be forged and with intent to defraud, and it therefore becomes necessary to consider first what constitutes uttering, and, secondly, where uttering takes place.

[His Lordship read section 6 (2) of the Forgery Act, 1913, and continued:] Although for the purposes of this count it was not necessary for the prosecution to prove that any of the forged documents was in fact uttered within the meaning of section 6 (2), evidence was tendered to show that of the six forged documents three were enclosed in letters from Austay London Ltd. to Z.A.K. Each of these letters appeared to show that the appellant Owen had dictated it, as his initials were typed upon it. As the original letters were not available at the trial, there was no direct evidence to prove that any of them had been posted to Z.A.K., but a carbon copy of each letter was found in the files of Austay London Ltd. and, in the absence of any evidence to the contrary, it was open to the jury to infer that each letter with its enclosed forged document was sent in the normal course of business by post to Germany.

It was contended for the appellants that the posting of a letter enclosing a forged document does not constitute an uttering of the document within the meaning of the Act and that the uttering (if any) occurs when the letter is received and opened by the addressee. A similar contention was put forward in *Reg.* v. *Finkelstein and Truscovitch*,[13] and although the case is only shortly reported, it is plain that Stephen J.[13] was of opinion that the posting in London of forged bonds in a letter addressed to a company in Brussels constituted an uttering of the bonds in London. The earlier decision of *Rex* v. *Giles* [14] is to the same effect. Apart from authority, the statutory definition already quoted is in sufficiently wide terms to include within its scope the posting of a letter containing a forged document.

It follows, therefore, that there was evidence to show that the alleged object of the conspiracy was in fact carried out, and carried out in London. But even if such evidence had not been tendered, it is clear that the alleged object of the conspiracy might have been carried out in this country, for example, by personal delivery of the forged documents to representatives of Z.A.K. or the German companies who might be in London. In such circumstances it is clear from *Reg.* v. *Kohn* [15] that the appellants could properly be indicted in this country.

It was also contended for the appellants that the judge failed to direct the jury adequately as to the difference between a false document and a forged document, or as to the necessity of establishing knowledge on the part of the appellants that the documents in question were forged. There is no substance in this contention. The fact that the documents were forged was not seriously challenged at the trial, and on several occasions in the course of his summing up the judge emphasized the point that the jury could not convict either appellant unless they were satisfied that he knew that the documents were forged.

The only other point in regard to this count of the indictment relates to the alleged intent to defraud. The same argument was put forward as was relied on in regard to count 3, but it is to be noted that in regard to count 5 the intent to defraud is alleged in general terms and is not directly related to Z.A.K. Even if it were right that no intention to defraud Z.A.K. was or could be established, it is clear that German suppliers were to be defrauded by means of the conspiracy alleged in count 5, and in these circumstances it was open to the jury to take the view that an intent to defraud was proved.

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[13] (1886) 16 Cox C.C. 107, 110.

[14] (1827) 1 Mood.C.C. 166.

[15] 4 F. & F. 68.

Count 6 charged the appellant Owen alone with a single offence of uttering a forged document knowing the same to be forged and with intent to defraud. For the reasons given in respect of count 5, it was open to the jury to convict this appellant on this count and it is unnecessary to discuss the matter further.

Although no appeal against sentence was included in the notices, counsel asked us, in the event of the appeal being allowed in whole or in part, to reconsider the sentences of four years' on Owen and three years' on Seth-Smith, and the court agreed to do so. Had the judge taken the same view as we have done on count 3, we do not think he would have passed these sentences. We have come to the conclusion that as the conviction on count 3 is quashed, and as the maximum sentence for uttering the documents charged in counts 5 and 6 is only two years', we think there should be a reduction. Discreditable as was the appellants' conduct, we do not feel that this is a case in which a longer sentence should be imposed for conspiracy to commit an offence than could have been given for the substantive offence. In any case the maximum sentence that could have been passed on Owen in respect of count 6 was only two years', while the sentence passed was actually one of four years' concurrent with the sentence passed on counts 3 and 5 for conspiracy. In all the circumstances we think the sentence on Owen should be two years' on counts 5 and 6 concurrent, and on Seth-Smith 18 months'. The sentences will date from conviction.

There remains the question of costs. The appellants have succeeded in their appeal as regards count 3. This raised an exceptionally difficult point of criminal law hitherto undecided, and was strenuously resisted by the Crown. Consequently, we think it only fair that the appellants' costs should be taxed and they should each receive one half.

Appeals allowed on count 3.
Appeals dismissed on counts 5 *and* 6.
Sentences reduced.

Solicitors: *Stikeman & Co.; Galbraith & Best; Solicitor, Board of Trade.*

C. J. E.

BEEVIS *v.* DAWSON AND OTHERS.

C. A.

1956
Nov. 5, 6, 7.

Singleton, Jenkins and Parker L.JJ.

[1953 B. No. 5164.]

Libel and Slander — Libel — Practice — Trial — Jury — Justification— Evidence to rebut justification not given by plaintiff—Trial stopped by jury before conclusion of evidence for defence—Award of one farthing damages—Right of plaintiff to give evidence in rebuttal of defence—Whether direction should have been given by judge to jury.

Practice and Procedure—Jury, civil action—Verdict—Plea of justification by defendants — Plaintiff's evidence in rebuttal not given — Intervention of jury before conclusion of defendants' evidence— Plaintiff's right to give evidence in rebuttal—Discretion of judge as to procedure.

Barrister—Conduct in court—Assistance to court—Continual bickering between counsel—Duty to ask court for directions on procedure.

In an action for damages for libel the defendants pleaded justification and at the trial both justification and publication were in issue before the jury. The plaintiff did not give evidence himself, but a number of other witnesses were called on his behalf. Counsel for the plaintiff asserted that he would call the plaintiff to give evidence in rebuttal after the defendants' evidence of justification had been heard. The defendants' case was begun and some evidence was given. Counsel for the defendants told the jury (wrongly) that the onus was on the plaintiff to disprove the truth of statements relied on; and that they might stop the case and award one farthing damages only. There was bickering between counsel throughout the hearing. Before the conclusion of the evidence for the defendants the jury, having retired at their own request, expressed on returning the view that the plaintiff should receive one farthing damages. Before the jury retired the judge had given them a short direction pointing out that they must not assume, in the absence of evidence, that facts mentioned in the opening speech of counsel for the defendants were true. The judge did not mention evidence which had already been called to support the defendants' plea of justification, nor had he ruled whether the plaintiff was to be allowed to be called in rebuttal:—

Held, that, in all the circumstances, the judge's direction to the jury was inadequate and it was in the interests of justice that there should be a new trial before a judge alone. The principle laid down by Abbott C.J. in *Browne* v. *Murray* (1825) Ry. & M. 254 as to the calling of evidence by the plaintiff in rebuttal of the defence of justification was subject to the overriding discretion of the court to give such direction as might be just and convenient in the particular circumstances; and no direction had been given by the judge. The judge alone had a right to instruct the jury when they could stop a case and award the plaintiff contemptuous damages.

Alexander v. *H. Burgoine & Sons Ltd.* [1939] 4 All E.R. 568 considered.

Per Singleton and Parker L.JJ. A member of the Bar is in court to assist in the administration of justice; he is there to help the judge and, when there is one, the jury to arrive at a proper result. It was almost impossible for justice to be done if a case was conducted as this one was. The judge's failure to give an adequate direction arose from the bickering between counsel. He should have been asked to decide early on the mode or manner in which the case should be heard.

Decision of Finnemore J. [1956] 2 Q.B. 165; [1956] 2 All E.R. 371 reversed.

APPEAL from Finnemore J., sitting with a jury.[1]

The plaintiff, Frederick John Beevis, claimed damages against the defendants, George John Dawson, Gilbert Alastair William Graham Cockburn and Jasper Addis, for libel which, he alleged, was contained in, inter alia, a letter signed "The Watcher," alleged to have been published by the defendants about October, 1953, and for slander alleged to have been uttered by the defendants at the time of publication; and the plaintiff also asked for an injunction. On July 2, 1954, interlocutory judgment in default of defence was signed against the third defendant, Jasper Addis, for damages to be assessed at the trial of the action against the first two defendants. The first two defendants, by their defence, pleaded, inter alia, justification, and denied certain of the publications alleged, so that when the action came on for hearing both justification and publication were in issue before the jury.

At the trial of the action a number of witnesses, including the third defendant, Jasper Addis, gave evidence on behalf of the plaintiff, but the plaintiff did not himself go into the witness-box or give evidence on his own behalf, his counsel intimating, in response to comment from counsel for the defendants, that the plaintiff had a right to give evidence in rebuttal after the evidence for the defendants had been heard. At the conclusion of the evidence called on behalf of the plaintiff, his counsel said: "That "is the plaintiff's case." Counsel for the defendants in his opening speech commented on the fact that the plaintiff had not given evidence, and also on the evidence which had been given, and referred to evidence which would be given on behalf of the defendants. He also made a statement as to onus of proof (which he now admitted to be wrong) and further told the jury that they had the right to stop the case and return a verdict of one farthing damages.

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[1] [1956] 2 Q.B. 165; [1956] 2 All E.R. 371.

Witnesses were then called and gave evidence on behalf of the defendants, but before the evidence for the defence was concluded the jury intimated that they wished to retire and consider matters amongst themselves. Finnemore J. warned the jury that they must only consider the evidence which they had heard, and not speeches telling them about evidence which they were going to hear, but no direction or summing-up was given. On their return the jury expressed their unanimous view that the plaintiff should receive one farthing damages. The jury were discharged and objection was thereupon taken on behalf of the plaintiff to the verdict of the jury, and a new trial was asked for. The judge, having heard argument, refused the application and entered judgment for the plaintiff for the amount awarded.

The plaintiff appealed.

J. D. Cantley Q.C. and *Norman Tapp* for the plaintiff. The liability of the defendants for the libel has been established by the verdict of the jury, but the plaintiff asks for a new trial on the question of damages. Throughout the trial below Mr. Leonard Caplan, then leading counsel for the plaintiff, admitted that the onus of proving publication was on the plaintiff, but he contended that the burden of proving justification rested on the defendants. He also claimed that he was entitled to postpone the evidence of the plaintiff in rebuttal of the defendants' plea of justification until such time as the evidence of the defendants in support of that plea had been given. The plaintiff, owing to the course which the trial took, was prevented from giving his rebuttal evidence, and it is submitted that the jury were not entitled to stop the case in the middle of the defendants' evidence and to return the verdict which they did. Neither the plaintiff nor the defendants Dawson and Cockburn gave evidence. The defendants' counsel, Mr. Platts-Mills, erroneously invited the jury to stop the case and return a verdict of one farthing damages. Only the judge in his discretion could so direct the jury: see *Alexander* v. *Burgoine & Sons Ltd.*[2] No direction was given by the judge as to the true legal position and counsel for the plaintiff raised no objection at the time, and the course taken by the jury and their verdict show that they did not understand what was the legal position between the parties. Mr. Caplan had made it clear that he intended to call evidence in rebuttal after the defendants' evidence had been concluded, though admittedly no direction had been given by the judge, nor had he been asked to give it.

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[2] [1939] 4 All E.R. 568.

A plaintiff is entitled to give evidence in rebuttal of a plea of justification. He may give such evidence at the same time as he gives evidence in proof of publication, or he may separate it and call it after the defendant has given his evidence in proof of justification. Should he take the former course he cannot afterwards call evidence in rebuttal: see the judgment of Abbott C.J. in *Browne* v. *Murray*.[3] [Gatley on Libel and Slander, 4th ed., p. 582; Taylor on Evidence, 12th ed., p. 385, and Spencer Bower on Actionable Defamation, 2nd ed., p. 101, were also cited.]

A plaintiff has the option of dividing his evidence and that was done in this case. The argument of defendants' counsel amounted to a misleading of the jury. A plaintiff is entitled to be considered as of good character until the defendant has satisfied the jury to the contrary by evidence. The jury should have had a direction from the judge as to the plaintiff's right to give evidence in rebuttal. It was not a fair trial. The verdict of the jury was premature and ought not to have been accepted. There should be a retrial. [Reference was also made to *Hobbs* v. *Tinling (C. T.) & Co.*,[4] *Rees* v. *Smith*,[5] *Wright* v. *Willcox*,[6] *Shaw* v. *Beck*,[7] *Maclaren & Sons* v. *Davis*[8] and *Penn* v. *Jack*.[9]]

J. F. Platts-Mills and *R. Gavin Freeman* for the defendants Dawson and Cockburn. The judge acted correctly in entering judgment on the jury's finding and there is no ground for a new trial. If the verdict and judgment be good an error committed in the course of the hearing is merely in the rough and tumble of a long trial by jury. It is admitted that when the defendant pleads justification in a libel action he has to prove it, but it does not follow that he has to prove it with his own witnesses. It was assumed by the defence that the plaintiff's right to give evidence in rebuttal had gone. The witnesses called by the plaintiff at the outset were known as close associates of his and some of those witnesses in their cross-examination had revealed a good deal of the matter relied on in justification, which may have affected the jury in coming to their verdict. It is not possible to say that the jury's finding was based on what was said by counsel for the defence in his opening speech as to the right of the jury to stop the case. It was an error in practice and not an error in law. A jury has a right to stop a case the moment the plaintiff's case is completed, and defendants' counsel was merely usurping the discretionary right of the judge and not stating what was not good law. If it be the case that the plaintiff had a right to give evidence in rebuttal after the defendants had given that evidence he should have asked for a definite ruling on the point. By not doing so he had put himself out of court.

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[3] (1825) Ry. & M. 254.
[4] [1929] 2 K.B. 1.
[5] (1816) 2 Stark. 31.
[6] (1850) 9 C.B. 650.
[7] (1853) 8 Ex. 392.
[8] (1890) 6 T.L.R. 372.
[9] (1866) L.R. 2 Eq. 314.

Where the plaintiff's case is made suspect by his own witnesses he may not exercise an option to call rebutting evidence. The answers given by the plaintiff's witnesses in cross-examination, although they are called only on the issue of publication, may alter the right of the plaintiff as to the order in which he deals with the issue of justification. It is not open to the judge to rule that counsel for the defence cannot cross-examine as to the issue of justification plaintiff's witnesses called on the issue of publication. If the judge has already given a ruling as to procedure, the position will be quite different, but here the judge had given no ruling. The evidence can change the onus of proof. The moment there is evidence given by the plaintiff's witnesses tending to prove justification, they must be treated as rebutting witnesses, and the plaintiff no longer has a right to reserve further evidence in rebuttal until after the defendants' case is closed.

[SINGLETON L.J. I think it was a matter of discretion for the judge, as a question of general convenience.]

The onus of proof is not static. It shifts from side to side with the run of the evidence and is not fixed by the pleadings: see Phipson on Evidence, 9th ed., p. 44. The court should not grant a retrial unless there has been a miscarriage of justice (R.S.C., Ord. 39, r. 6). If this court is of opinion, as was the trial judge, that the jury was entitled to give its verdict on the evidence which it had heard, there could not be a miscarriage of justice. The verdict of the jury was justified and should be upheld.

Cantley Q.C. in reply. The verdict should not stand, having regard to the course the trial took. Putting the matter at its worst against the plaintiff, when the jury retired the question of calling rebutting evidence was brought to the notice of the judge. When that fact is recalled, together with the misdirection by counsel on onus of proof and the invitation to the jury to stop the case given by defendants' counsel, and the failure of the judge to give any sufficient direction, it is clear that there was a failure to give the jury such a direction as they needed before they could do justice. If there was a failure to give the judge the assistance he needed, a new trial should be ordered: *Weiser* v. *Segar.*[10]

The defendant Addis was not represented.

SINGLETON L.J. This is an appeal by the plaintiff from a judgment of Finnemore J., who sat with a jury and who gave his judgment on May 1, 1956. The claim of the plaintiff, Frederick John Beevis, was for damages for libel, and it was brought against three defendants, the first and chief of whom is George John Dawson. The other two are Gilbert Alastair William Graham Cockburn and Jasper Addis. Jasper Addis was called as a witness on behalf of the plaintiff. The verdict of the jury was that the plaintiff should recover the sum of one farthing damages against all the defendants. Addis had not entered an appearance, and judgment against him had been signed in default. The plaintiff asks this court to say that the verdict and judgment should be set aside, and that there should be a re-hearing of the case, and that includes a request for a re-hearing against Addis, who gave evidence on behalf of the plaintiff. Addis has not appeared or been represented upon this appeal, and I say nothing more about the case against him. Obviously the main contestants are the plaintiff and Dawson, the first defendant.

The document of which complaint is made appears to be addressed to George Dawson, and it gives what purports to be some part of the history of the plaintiff. There can be no doubt that it is defamatory of the plaintiff on the face of it. The odd thing is that it appears to be addressed to Dawson, and there was evidence to show that Dawson had published it in different ways. I do not profess to be familiar with the whole of the evidence which was given in the case, though a good deal of it has been read to us. Nor do I propose to read the document. I have said enough about it.

A statement of claim was delivered on behalf of the plaintiff, and a defence was delivered on behalf of the first two defendants. The defence denies publication. It sets up more than one defence, and the last paragraph of the amended defence pleads that the words are true in substance and in fact, and it adds that "Full particulars of justification will be delivered as ordered." The particulars of justification, which were delivered on August 9, 1955, occupy 17 pages of foolscap, and there are 32 paragraphs of them. They are very complete, I should say, and upon those particulars the parties went to trial. The defendants are bound by the particulars of justification which they have given.

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[10] [1904] W.N. 93.

The plaintiff was represented at the trial by Mr. Leonard Caplan Q.C. and Mr. Tapp. The first two defendants were represented by Mr. Platts-Mills. There began, almost from the commencement of the case, a wrangling or quarrelling or bickering between counsel, and it lasted throughout the case. Finnemore J. said in reply to a complaint by Mr. Caplan: "There is a lot to be complained "of on both sides, if you want my view. I hope both of you "will be careful." It is not often that a judge has to address counsel in that way. In reply to that remark, Mr. Caplan said: "My Lord, over and over again this has happened." A little later Mr. Platts-Mills said: "My learned friend does not want "me to go into that matter. The whole of his interventions "seem to be aimed at preventing me opening to the jury the "matters I want to. I have never been so dealt with in the "opening of a case in my life. It is extremely embarrassing to "proceed with the opening at all when at every point I am met "with a reading of long passages." Finnemore J. said: "A "lot of people have the idea that juries do not comprehend what "is going on. I think they do." [Mr. Platts-Mills]: "If your "Lordship pleases." [Finnemore J.]: "Juries are intelligent "people and they know what is happening. They can weigh up, "rightly or otherwise, as they think fit, interruptions on either "side—whether they think they are justified or not." [Mr. Platts-Mills]: "If your Lordship pleases." [Finnemore J.]: "They are the best people in the world to do it."

The training of one who is called to the Bar in this country is intended to help him to understand that a member of the Bar is a helper in the administration of justice. He is there to help the judge, and, when there is a jury, to help the jury, to arrive at a proper result in the dispute between the parties. If a case is conducted as this was, the judge is deprived of the assistance which he is entitled to expect from counsel. Continuous bickering becomes a burden for everyone in court—for judge and for jury—and it is almost impossible for justice to be done if that goes on. It is not surprising if, in such circumstances, a judge gets tired or if the jury get tired; sometimes it leads to confusion. That may well have happened in this case. I hope it will be a long time before this kind of thing happens again. Jurors, who are called to sit in this building where disputes between litigants have to be decided, ought not to have their time wasted as was the case here.

Early in the hearing Mr. Caplan said that he did not propose to call the plaintiff at the time one might expect; he preferred to keep his evidence to be called in rebuttal, when evidence had been given on behalf of the defendant Dawson in support of his justification of the alleged libel. I feel sure the jury would have been interested to see the plaintiff. He was not called during the hearing. Quite often Mr. Caplan said that he was going to call him, and on one occasion he went so far as to say that he undertook to call him when the defendant had given evidence to prove his particulars of justification. There came a time when the jury asked if a majority verdict would be accepted, and they were told that it could not be, or would not be. After the plaintiff had closed his case, subject, it was submitted, to his right to call evidence in rebuttal, and Mr. Platts-Mills had opened the defendants' case for roughly a day and a half—allowing, of course, for interruptions—and he had called some evidence, the jury asked if they might retire. There was some discussion in the presence of the jury. A short direction was given to them by the judge and they retired. Mr. Caplan reminded the judge that perhaps the jury should have been told something else. After a considerable interval without any further direction, the jury came back to court and returned a verdict for the plaintiff, assessing the damages at one farthing, and, after argument, judgment was entered for the plaintiff with one farthing damages.

It might well have been thought by everyone that, when the jury decided that they wished to retire before the defendants' case was concluded, the jury was about to find against the plaintiff and for the defendants. But the jury did not do so; they found against the defendants, assessing the damages at the low figure of one farthing. The defendants do not object to that; they could not well do so for the jury did what Mr. Platts-Mills had suggested that they should do. It is the plaintiff who appeals and seeks a re-hearing. The only reason that I can see for the jury adopting that course—finding against the defendants in the middle of the defendants' evidence—was that it was what Mr. Platts-Mills had invited them to do during his speech, as I shall show in a moment. However, they did it, and now objection is taken on behalf of the plaintiff.

The plaintiff's appeal in this court has been in the hands of Mr. Cantley and Mr. Tapp, and I hope I may say that it has been conducted with skill and with care. Certain main points are taken. It was submitted by Mr. Cantley, first, that the plaintiff was entitled to give evidence in rebuttal before the jury gave a verdict, and secondly, that the jury should not have been allowed to return a verdict until they had been directed (a) on the position in law, and (b) on the nature and effect of the evidence they had heard. The plaintiff relied upon the fact that at one stage of his opening of the defence Mr. Platts-Mills had misstated the evidence. I am inclined to think that Mr. Platts-Mills was doing that which he was entitled to do, though the impression given from the transcript of his opening may lead one to think that it might convey to the jury that that which he said had been reached in the evidence already given, whereas in fact it had not. I do not think that there is any real substance in that part of the submission, and I say no more about it. There are matters of more importance.

It is claimed on behalf of the plaintiff that, there being a plea of justification in the defence, the plaintiff was entitled to reserve his evidence upon that part of the case until later, and then to give evidence in rebuttal. That submission is based on statements of practice in several textbooks. I refer to one only, Gatley on Libel and Slander, 4th ed., at p. 582: "Where there "is a plea of justification on the record it is usual, and more "convenient, for the plaintiff not to call any evidence in rebuttal "as part of his own case, but to leave it to the defendant to "make out his plea, and then give evidence of any matters "which are properly admissible to rebut the plea. The plaintiff "may, however, anticipate, if he thinks fit, and give all the "evidence he intends to offer in rebuttal at the outset. But he "is not entitled to call some evidence in rebuttal in the first "instance, and to reserve the remainder for reply to the "defendant's case."

The passage is based on several authorities, of which the most important appears to be *Browne* v. *Murray*,[1] the headnote to which reads: "In an action for a libel, where the general issue "is pleaded, and also special pleas in justification, the plaintiff "may, in the outset, give all the evidence he intends to offer to "rebut such justification, or he may do so in reply to evidence "produced by the defendant, but he is not entitled to give part "of such evidence in the first instance, and to reserve the "remainder for reply to the defendant's case." Abbott C.J. said[2]: "In actions of this nature, the plaintiff may, if he thinks "fit, content himself with proof of the libel, and leave to the

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[1] (1825) Ry. & M. 254.

[2] Ibid. 254.

C. A.
1956

Beevis
v.
Dawson.

Singleton L.J.

"defendant to make out his justification; and then the plaintiff "may, in reply, rebut the evidence produced by the defendant. "But if the plaintiff in the outset, thinks fit to call any evidence "to repel the justification, then, I am of opinion, that he should "go through all the evidence he proposes to give for that purpose, "and that he shall not be permitted to give further evidence in "reply. It is much more convenient for the due administration "of justice that this course should be adopted, otherwise there "will be no end to evidence on either side, as the defendant "would be entitled again to call witnesses to answer those last "produced by the plaintiff to rebut the justification." In a footnote to the report in the English Reports there is a note, part of which reads: "In *Rees* v. *Smith*,[3] which was an action of "trespass, for breaking and entering a dwelling-house, and "seizing goods, with the general issue, and pleas in justification, "Lord Ellenborough states that the general rule was, that 'when "'by pleading, or by means of notice, the defence was known, "'the counsel for the plaintiff was bound to open the whole case "'in chief, and could not proceed in parts; that when it is "'known what the question in issue is, it must be met at "'once.'" That is followed by a reference to the change in practice which had taken place.

I venture to doubt whether there is a hard and fast rule either way. The authorities seem to me to show that the practice is based on general convenience. It must depend, of course, upon the issues which are raised; obviously it must depend upon the pleadings in the case in which the issues are set out. If publication is admitted and justification is set up as a defence, the plaintiff is entitled to say that the onus is upon the defendant; that it is for him to prove his case. Equally if, by the answer to an interrogatory, the plaintiff can prove his case, and does so, the onus on the issue of justification is upon the defendant. In most cases there are other pleas, and the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of parties, and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the judge decides that one course is preferable to another, his decision should in general be treated as final. He will not deprive the plaintiff of the opportunity of reserving his evidence until he has heard the evidence of the defendant in support of the plea of justification, if he considers that any injustice can be done to the plaintiff by such a ruling. If the judge considers that the better course is that the plaintiff should be allowed to reserve his answer to the plea of justification until after the defendant's evidence in support of the plea has been given, the defendant's counsel cannot offset that by asking questions on that issue to draw the plaintiff's witnesses, as Mr. Platts-Mills suggests. It is not for the defendant to decide how the trial shall be conducted.

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[3] (1816) 2 Stark. 31.

In these days particulars of justification have to be given, and the defendant is bound by them and cannot go beyond them. So that the plaintiff knows, before the hearing commences, what charges he has to meet. Thus there can be no element of surprise in the case before us. There were given abundant particulars of justification. One might have thought that a plaintiff seeking damages for libel would have been only too anxious to answer those charges. The plaintiff was not. He might have followed that which I regard as the usual practice, and have gone into the witness box; but he did not do so. His counsel said often that he proposed to do so later. The judge told him of the position, though he did not rule either way. As to general convenience, it cannot be doubted that it would have been better had the plaintiff been called and examined and cross-examined on the particulars of justification. That which happened in the present case gives as good an instance of inconvenience as could be found. The jury decided that they would like to retire. Everyone forgot—I suppose everyone forgot—that there had been no ruling upon the request that the plaintiff's evidence might be postponed until after the defendants' evidence of justification had been given. When the jury asked if they could retire, it must have been obvious to Mr. Caplan that they were inclined to take a view adverse to his client, for they had been told that they could not decide against the defendants without hearing the whole of their case. It ought then to have been pointed out to the judge by one counsel or by the other that some evidence in support of justification had been called, that the plaintiff claimed the right to give evidence in rebuttal, and that the jury could not come to a conclusion without a decision upon that point. Nothing was said about this; it may be that the judge thought, and the jury thought, that the last thing the plaintiff wanted to do was to go into the witness box.

The jury decided against the defendants on the issue of justification, of which the defendants do not complain; but the plaintiff complains that they only gave one farthing damages.

It is right that I should now state the course that was taken. The witnesses of the plaintiff, called to prove publication, were cross-examined by Mr. Platts-Mills on other matters. There was objection by Mr. Caplan, but the cross-examination was allowed, and from the answers Mr. Platts-Mills argues that there was some evidence given by those witnesses which would tend to rebut the particulars of justification given, and that the plaintiff cannot split his case; that his case should have been completed and all his evidence given before the defendants were called upon to give any evidence.

On the fifth day of the hearing, as the plaintiff's case was about to conclude, Mr. Caplan said that he had only one more witness to call, and Finnemore J. said: "Mr. Caplan, there is "one point. I am not, of course, going to ask hypothetical "questions, but you may want to consider at some time the "question of the plaintiff himself. It is for you, of course, "to decide whether to call him or not. What I want to say is "this, that I rather gathered from what you said on Friday that "you indicated there was some evidence which you want him "to reply to?" [Mr. Caplan]: "Yes." [Finnemore J.]: "Now, "if that is so, do you want to close your case?" [Mr. Caplan]: "My Lord, with respect, the authorities are quite clear on that." [Finnemore J.]: "I am not deciding it now; but if you want to "call him in the case and the defendant objects, I shall have "to be satisfied that you can in fact do it." [Mr. Caplan]: "Perhaps it might be desirable then that I should cite to your "Lordship the authorities on the matter now." [Finnemore J.]. "Yes. I do not think I could decide it now, because it is purely "hypothetical. I do not know what is going to happen." [Mr. Caplan]: "Yes, my Lord." [Finnemore J.]: "I mention it now "because you must take the risk." [Mr. Caplan]: "Of course, "my Lord, I understand that. As the matter is raised, may I "briefly indicate what I understand the position to be. The law "on the matter, as I understand it, is this: that all the evidence "in rebuttal must be given at one time. When I say all the "evidence, that means all the witnesses who deal with rebuttal. "They cannot be split; they cannot be given some before the "defendant gives his evidence and some afterwards. They have "all got to be given either before or after. Now, as the usual "course is that evidence in rebuttal is given after, as is stated "in Gatley, it follows that if the plaintiff is going to give evidence "in rebuttal, as the evidence in rebuttal cannot be split into two "parts, if the usual course of giving the evidence in rebuttal

" after the evidence of the defendant is followed, the plaintiff " must give his evidence in rebuttal at that time; because if he " gives it before, then all the evidence in rebuttal has got to be " given before, which is manifestly wrong, of course, because " it means one is rebutting something as to which there is as yet " no evidence; and that is why the usual course is that you rebut " after some evidence has been given."

I think I made it clear that I do not regard the course which Mr. Caplan took as the usual course. I am not prepared to adopt the passage from p. 582 of the last edition of Gatley in that respect. Finnemore J. said: " It certainly is not the usual " course in libel cases. There being evidence before the court " which you want the plaintiff to explain, obviously this must " be the time to do it." [Mr. Caplan]: " My Lord, there is not as " yet "—[Finnemore J.]: " I thought you said there was." Then there occurs a long answer from Mr. Caplan which ends: " I shall " give the assurance that Mr. Beevis will under those circumstances be called. But at the moment it is not evidence, and " at the moment there is no evidence at all." The discussion ends with a line spoken by Finnemore J., who is recorded in the transcript as saying: " Then we will deal with it if it does " arise."

The judge had indicated to Mr. Caplan that in his view he ought to call his client, if he was going to call him, before he closed his case. He had indicated that as the usual course, and he had said that if Mr. Caplan did not do it he was taking a risk, and that that was the obvious time to call him. Mr. Caplan had other views. There began thereafter, or very soon thereafter, the opening speech of Mr. Platts-Mills on behalf of the defendants. That occupies, I think I am right in saying, something over 80 pages, which are transcribed for the purposes of the appeal, I suppose.

Certain parts of Mr. Platts-Mills's opening speech are the subject-matter of complaint. This is one sentence used by Mr. Platts-Mills. " The plaintiff in effect pleads that the things said " about him are untrue, are falsehoods. He has to put that in " his statement of claim, that the things said about him are " falsely said about him, and as he says that in his statement " of claim, because it is denied and Dawson says ' No; they are " ' true,' he has to prove it; but if he does not go into the witness " box, he has not proved it, and therefore you are entitled to say " —indeed you are morally bound to say—that no case is made " before you, because he will not put his own character in issue."

Mr. Platts-Mills has recognized that that misstates the law. What I fail to understand is why someone did not correct him at the time. Perhaps the judge had not heard it, as is possible if Mr. Platts-Mills was turning towards the jury. But I should have thought that someone would have heard and that that would have been corrected. It never was corrected. Counsel on both sides were counsel of experience. The jury may have attached importance to the statement of Mr. Platts-Mills—they generally pay attention to what counsel say—and the information they were given was quite wrong.

On the next page of the transcript there is read to the jury an extract from a case reported in "The Times" at some time, and a discussion took place between counsel. Mr. Platts-Mills said about the plaintiff: "My learned friend has said he will be called "at the proper time, or in due time, or if it be appropriate. It "will not be for my learned friend to decide that." I suppose Mr. Platts-Mills was prepared to argue that the time for calling the plaintiff had gone. He said: "That is why the case is now "put against him, because he has not gone into that witness box "at this stage; and I would add that our practice is that a person "who alleges he has been libelled goes into that box first, the "first witness, the first man in to bat, to face the bowling. That "is our practice. That is not binding. He can ignore it, if he "likes. He need not go in at all, with the results that I am "putting before you." Later, Mr. Platts-Mills said to the jury: "It is open to you, members of the jury, therefore, to apply "the wisdom of our forefathers in the law, which only reflects "their experience over years of juries and their reactions. The "learned judges only reflect in their dicta their long experience "of knowing how ordinary men and women, such as ourselves, "behave in judging a situation just like that we have got today. "It is not open to you to award Mr. Beevis 20s., nor any other "sum, but if you are not prepared to stop the case now, and say "'No libel, the action may be dismissed,' I invite you to award "him damages, to award him the one figure that really does "reflect his worth, to award him a farthing. That is open to you "now. I invite you to do that, and at any time you think it is "convenient you can stop the action and take that course." That remark of counsel was contrary to practice, and, as Mr. Platts-Mills now admits, was contrary to the law. Counsel had no right to say that to the jury: see *Alexander* v. *H. Burgoine & Sons Ltd.*[4]

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[4] (1939) 4 All E.R. 568.

Later Mr. Platts-Mills said: "Members of the jury, you have "a public duty to face patiently this squalid and sordid inquiry, "the exposure of his life. You also have a public duty, if you "think it right, to save the time of the court and save public "expense, and if you are satisfied that the case has not been "made out—it is not for me to satisfy you, but if you think Mr. "Beevis has not satisfied you already that he has got a good and "unblemished character—and he cannot satisfy you if he has not "gone into the witness box to swear it—then you can dispose of "the case now. That is open to you." That again is wrong. The onus upon the issue of justification was upon the defendants. Mr. Platts-Mills continued: "Members of the jury, if you think "it right to go on, then my learned friend will have his "enthusiasm for information fully satisfied." [Mr. Caplan]: "Thank you. We should all like to have the information." [Mr. Platts-Mills]: "And we shall give you the story. Members of "the jury, you have heard already some of the more recent "events"—and then the learned counsel told the jury more of the evidence which was coming before them if they wanted to hear it, and it became obvious that it would take a considerable time.

The judge asked how long it would take. It does not appear to have occurred to anyone that there was anything wrong in counsel telling a jury that they could send the plaintiff away with a farthing at that stage if they wished to do so, and that it would be saving public time. It appears to me, from the two passages I have read, that it is really asking the jury to save public time, including their time, and "you can do that by finding against my "client," said Mr. Platts-Mills, "and giving the plaintiff a farthing damages."

As I have said, the jury ultimately found for the plaintiff, and gave a farthing damages, in the middle of the defendants' case. They adopted that which Mr. Platts-Mills had put to them. Perhaps they were persuaded to do it—or they were helped to do it—by that which learned counsel had said to them, and no one pointed out that it was wrong. There were interruptions enough and to spare in this case, but there were none when counsel went astray in the respects to which I have referred.

The jury were allowed to go at one stage, but apparently they stayed somewhere and talked the matter over. There is a reference to that in the transcript and, still during Mr. Platts-Mills's opening address, the judge said: "Mr. Caplan and Mr.

"Platts-Mills, the jury have sent me a question to which there "is a very simple answer, 'Are we required to give a unanimous "'decision or can it be a majority verdict?' The answer, members of the jury, must be 'a unanimous decision.' That is the "ruling in all our jury cases, although in some cases, sometimes, "the parties may agree otherwise. But without that it must "be unanimous."

Later Mr. Platts-Mills said: "But I venture, even at the cost "of repeating, to say that when the plaintiff has closed his case, "the onus of proving his case being on him and his counsel, from "that time onwards it is open to you, and from now onwards, to "come to a certain view of the matter. If you do all come to that "view fairly and on your general common view of the case, then "you may think that you are justified in expressing that view "in this case above all, more particularly if you attach any "importance to what Mr. Hatton indicated, a case where he was "perhaps most closely concerned, where his money was involved. "You may think you have a public duty to save the time of the "court, to save public expense, and indeed to save the very "great expense to which both parties are subject, and act on "any such view which you may form."

Then evidence was called on behalf of the defendants. The defendant Dawson was not called. When several witnesses had been called the jury asked if they might retire to discuss the matter for a short time. Finnemore J. said: "Yes, you are "entitled to do that" and Mr. Caplan agreed. [Finnemore J.]: "Very well." [The foreman]: "On the point I raised yesterday, I shall not raise the point." [Mr. Caplan]: "My Lord, "I should say this, that I would have preferred that the jury "had heard the questions that I put on these documents to the "witness who has produced them, because my learned friend in "putting the documents said certain things about them and "omitted to read certain parts of them, which make a very great "difference, and perhaps it might be wrong if the jury retired "at this stage while a witness for the defence was in the witness-"box and had not yet been cross-examined. I think perhaps it "might not be right that that should be done at this stage, but "when this witness has given all his evidence and been cross-"examined, then I think it might be." [Finnemore J.]: "I "think, Mr. Caplan, the official witness has done nothing him-"self except to produce documents and give the figures. If "you want to tell the jury about anything, you can.

"Members of the jury, you must not pay any attention to any "comments which were made." After further discussion the judge said to the jury: "Now you are entitled to go away and "discuss this matter. The only thing I ought to say to you is "this: you have heard the plaintiff's case, and that is that. "You have not heard all the defendants' case, if you want to "hear the rest of it. The one thing I ought to say is this: You "have heard Mr. Platts-Mills speak for the defendants about "evidence he was going to produce. You will not, of course, "assume that anything that he says has been proved if the "evidence has not yet been called. You can only deal with "the evidence you have actually heard. The speech is not "evidence on either side. The speech is only to tell you what "the evidence is going to be. You must consider only what has "actually been proved on one side, or the other, up to the "moment. I think that is obvious."

It is now claimed that this is a misdirection or an insufficient direction to the jury, for some evidence had been called in support of the defendants' plea of justification. It is pointed out that there had been no ruling upon whether the plaintiff was to be allowed to be called in rebuttal. It is said that in those circumstances the jury ought to have been told: "You cannot really "discuss this matter without hearing what the plaintiff's evidence "is, and you cannot really hear that until you have heard the "whole of the defendant's evidence." At that stage Mr. Caplan might have reminded the judge what the position was, and said to him: "May I call the plaintiff before the jury retire?" Although it must have been obvious to him that the jury were not taking a favourable view of his case, nothing of that was done. The jury having retired in charge of a sworn bailiff, Mr. Caplan then said to the judge: "My Lord, I have just been "reminded by my learned junior of one point; that is that it is "possible the members of the jury may be under the impression "that so far as any evidence has been given by the defendants "at all, that is all the evidence they have to consider; whereas, "as your Lordship knows, it is my respectful contention that I "am entitled to call evidence in rebuttal of any evidence which "so far has been given of character. I think it is a matter which "your Lordship will bear in mind, because otherwise there may "be misapprehension on the part of the jury with regard to that. "My learned friend has said so often that the plaintiff is not going "into the witness-box and 'you are not going to hear him'— "that they may have that impression."

A little later the jury sent in a question asking how they should act if they found that the words were substantially true. The judge said : "It has not all been proved yet, even if they "accept the evidence." [Mr. Caplan]: "I know what they "have got in mind, my Lord, and I think it is quite clear that "the answer is that if it is proved substantially, one knows the "law on the matter is that when they have heard all the evidence, "then there is justification proved." Later on Mr. Caplan said: "I was wondering, my Lord, whether perhaps the better way "of dealing with it was this: At some stage in the proceedings, "your Lordship will, whatever happens, have to tell the jury "what the issues are and what the law is. Bearing in mind "that the evidence has not yet been heard on both sides as to "truth, there does not yet arise the question of law, whether, "if, on the whole of the evidence this, that or the other is proved, "there is a complete defence. The question does not arise at this "stage, and it might well be that that would be the best answer "to send to the jury, that the question they have asked is one "which does not arise at this stage." Nowhere does Mr. Caplan say: "May I call the plaintiff?"

It is recorded that the jury returned into court at 12.50 p.m. Finnemore J. said: "Mr. Foreman, I do not want you to tell "me anything more than just what I ask you at the moment. "You just asked to come back to court. Do I gather that you "have come to some decision, or not?" [The foreman of the jury]: "You are correct in assuming that we have come to a "unanimous decision." [Finnemore J. to counsel]: "Do either "of you want to say anything before I ask them what it is?" Mr. Caplan then told the judge that he thought the judge might draw their attention to the decision of this court in *Hobbs* v. *Tinling*,[5] a case in which the jury had stopped the case in favour of the plaintiff before the plaintiff's case was concluded. Finnemore J. did not think that that had much to do with the matter. Thereupon the jury returned a verdict in favour of the plaintiff with one farthing damages.

Mr. Platts-Mills, towards the end of his submission before us, said that a mistake made by counsel in his address to the jury was not sufficient to cause this court to interfere with the verdict of the jury. It must depend upon that which is said, but in general I agree with Mr. Platts-Mills's submission. He drew attention to a passage from Gatley at p. 684. I need not

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[5] [1929] 2 K.B. 1; 45 T.L.R. 328.

C. A.
1956
Beevis
v.
Dawson.
Singleton L.J.

read it. He ended by saying that the verdict was "quite good "enough and should be supported."

Mr. Cantley submitted that there were three elements to be considered. The first was the question of evidence in rebuttal. That was still open. There was no ruling upon it by the judge. The plaintiff's counsel was entitled to think, and the plaintiff was entitled to think, that he was going to be called before any verdict was given. Mr. Cantley pointed out that there had been a reminder to the judge that the plaintiff was entitled to call evidence in rebuttal. He also relied upon misstatement by counsel as to the evidence, and upon the invitation given by Mr. Platts-Mills to the jury to stop the case. He said there were present those three elements, and there was no direction given to the jury. They were allowed to consider evidence of justification without being reminded that the plaintiff had asked to be allowed to be called in rebuttal. That point remained to be dealt with. Most unfortunately it seems to have slipped the judge's mind, and neither counsel reminded the judge of it. I think it was the duty of both counsel to help the court in that respect. Neither did so.

It is a great misfortune that this happened. It all arose from this bickering between counsel. The judge ought to have been asked to decide early on the mode or manner in which the case should be heard. If he had decided what, in his view, was most convenient, counsel should have followed that. But there arose this quarrelling, and there were continuous interruptions. No doubt it troubled the judge, and he could not be expected to remember everything that took place. But the failure to give the jury a direction on the question of evidence in rebuttal is a matter of some importance, and, when it is accompanied by the other matters which I have mentioned, I feel that it is in the interests of justice that there should be a fresh hearing between the parties. I regret it. I do not think that the fault is to be attributed to the judge. So far as I can see, he was faced with a position of great difficulty, through no fault of his own, and in a case which did not on the face of it present great difficulty. The difficulties were created during the hearing.

In the circumstances it is right that there should be a new hearing. I do not think that the burden should be placed upon another jury, though I have no reason to think that the same course of action will be followed upon another occasion. Counsel for the plaintiff and for the first two defendants agreed that in the circumstances, if there is to be a new hearing, it should be by judge alone, and I am satisfied that that is the proper course.

In my judgment the appeal should be allowed, and there should be a re-hearing of the case before a judge alone.

Jenkins L.J. I agree. I confess that I am reluctant to be a party to an order which will result in further time and money being expended upon this lamentable case; but it appears to me that the cumulative effect of the various matters to which reference has been made is such that the verdict and judgment in this case cannot stand.

The matters on which Mr. Cantley relied on behalf of the plaintiff were three matters relating to Mr. Platts-Mills' conduct of the case, and the matter of rebutting evidence. As to the matters of complaint against Mr. Platts-Mills, it is perfectly plain from the transcript that Mr. Platts-Mills did tell the jury more than once that the onus was upon the plaintiff to disprove the truth of the slanderous statements made about him. That is a surprising perversion of the law, and Mr. Platts-Mills does not attempt to support it. But who is to say what effect this statement may have had on the minds of the jury? It seems to me impossible to rule it out as a matter which probably did not affect the result one way or the other. For my part, I think that there is a considerable probability that it may well have affected the result.

The second matter was that Mr. Platts-Mills more than once invited the jury, if they thought they had heard enough, to stop the case and award one farthing damages only. That again, as is now agreed by Mr. Platts-Mills, was a course which counsel should not take. There appears to be clear authority for the proposition that any question of the jury intervening and stopping the case is a matter between the judge and the jury, and not a matter which should be introduced to the jury by counsel on his own initiative.

The third matter of complaint against Mr. Platts-Mills was that in the course of his speech he treated as proved various matters which had not been proved, or not sufficiently proved, although they may have formed part of the questions put in cross-examination or part of some statement made in opening of the matters which were going to be proved. We were referred to instances of this, and it was said that here or there Mr. Platts-Mills was inaccurate in his account of the evidence. But I think every passage which was pointed out to us as inaccurate was the subject of a correction by Mr. Caplan, who then appeared for the plaintiff. A certain amount of latitude must be allowed to counsel in developing his case, and on the whole I do not think this third matter of complaint against Mr. Platts-Mills is one which should be allowed any weight for the present purpose.

As to the matter of rebutting evidence, Mr. Cantley, as I understood his argument, put it almost as a matter of law that the plaintiff, in an action such as this, was entitled as of right to confine his evidence to proof of the publication of the libel, if indeed the publication was not admitted, leaving it to the defendant to lead what evidence he might think fit to establish any affirmative defence, such as justification, which he might seek to make out.

For my part, I do not think the principle which is stated in the case of *Browne* v. *Murray*,[6] to which my Lord has referred, really amounts to a rule of law, or a right to which the plaintiff may invariably lay claim as a matter of law. The first sentence of Abbott C.J.'s judgment, if I may read it again, is this: "In "actions of this nature, the plaintiff may, if he thinks fit, content "himself with proof of the libel, and leave it to the defendant "to make out his justification; and then the plaintiff may, in "reply, rebut the evidence produced by the defendant." Then the Lord Chief Justice went on to say that the plaintiff should not sever his evidence on the issue of justification, leading some of that evidence in presenting his own case and some of it in rebuttal of the defendant's case. I think that the principle there stated may well reflect a practice which in appropriate circumstances it is right to follow, but is subject to the overriding discretion of the court to give such directions as to the order in which the onus of proof is to be dealt with and in which witnesses are to be called as the court may find just and convenient in the circumstances of the particular case.

That, I think, is borne out by an observation of Parke B. in the case which was also cited to us of *Shaw* v. *Beck*.[7] That was a very different case. It was a case of an interpleader issue originating in the county court, and the question was whether the plaintiff, who claimed under a certain deed the property in issue, was obliged to do anything more in the first instance than simply prove the transfer of the property to him. It was held that the plaintiff was entitled to rest simply on the production of the deed, leaving it to his opponent to make out his case,

[6] Ry. & M. 254.

[7] (1853) 8 Ex. 392.

which I gather attacked the genuineness of the deed, even though the cross-examination of the plaintiff's witness, by whom the deed was produced, foreshadowed a defence of that kind. In that case Parke B. said [8]: "I am of the same opinion. I will "not say that this was not a matter in the discretion of the "judge; but I think that he ought to have exercised that "discretion in accordance with the rule of practice in these "matters, and that according to that rule he ought to have "admitted the evidence offered in reply."

That rule of practice, as the learned Baron called it, may be the best to follow in some cases, whereas in other cases it could not but be productive of inconvenience. It seems to me that the decision must rest in the discretion of the court. Nevertheless, Mr. Caplan was perfectly entitled, if so minded, to ask the judge to apply the principle stated in *Browne* v. *Murray* [9] and allow the plaintiff's evidence to be postponed until it became necessary to rebut the case of justification made out by the defendants. There is no doubt that Mr. Caplan did mention to the judge on several occasions his right to take that course, and, indeed, his intention to take that course. He expressed himself in some, at all events, of the passages in which this matter was dealt with, in somewhat oblique terms, and I think his conduct of the case is to some extent open to criticism in that he never did say in so many words: "I must now ask "your Lordship to allow me to call the plaintiff." He never said that, and in the result it was overlooked, apparently, that this was a point that had been raised upon which the judge had never ruled. So it came about that, before the defendants' case was finished, the jury retired and returned with their verdict awarding the plaintiff one farthing damages only, thereby carrying out, or acting consistently with, the exhortations in that behalf which they had received from Mr. Platts-Mills.

Mr. Platts-Mills suggested—and the judge, I think, in his judgment, to some extent supported this view—that there was enough in the matters that had already been brought to light in the cross-examination of the plaintiff's own witnesses, to justify the jury in taking the course that they did take. It does appear that matters little to the plaintiff's credit did come to light in the cross-examination of some of those witnesses. But the difficulty I feel in this matter is that there was evidence called on the defendants' side as well, and it was impossible for anyone to say that what influenced the jury in the conclusion to which they came was solely the evidence elicited from the plaintiff's own witnesses. It may have been that, but it may also have been the evidence adduced on the defendants' side, and that was evidence which, if Mr. Caplan's submissions in regard to calling the plaintiff had been acceded to, the plaintiff should have been allowed, if so minded, to rebut by his own testimony. That was not done, and I think, in view of the fact that it was not done, coupled with the other unsatisfactory features to which attention has been called, this is a case in which there should be a new trial, and accordingly that the appeal should be allowed.

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[8] 8 Ex. 399.

[9] Ry. & M. 254.

PARKER L.J. I also agree, and I can state my views very shortly. On Friday, April 20, 1956, at the sitting of the court —that being the eighth day of the trial—the jury asked to retire, and the direction they received was the short direction which Singleton L.J. has read. The question, as I see it, in this appeal is whether that direction was sufficient and adequate, having regard to the state of the evidence and the course of the proceedings up to that point. It is to be observed that the position then was that the plaintiff's case was closed. Mr. Platts-Mills had addressed the jury on behalf of the defendants, and I think some three witnesses had been called for the defendants. At least, there had been a whole day of evidence called by the defence to support the plea of justification. I will assume, without going through the evidence, that if the jury had stopped the case and given this verdict at the end of the plaintiff's case, they would have been justified in doing so. I will assume that there was evidence then before them which entitled them to give the plaintiff contemptuous damages.

But, as I have said, that was not the point at which the verdict was given. It was given after some evidence had been given by the defendants, and before the judge had ruled on the question whether the plaintiff was entitled to be called in rebuttal. Mr. Caplan had throughout, both in opening and at many stages in the proceedings, said that he was going to call the plaintiff, and he always said that he was going to call him after the defendants had given their evidence as to justification. Indeed, he went further, I think, and gave an undertaking, qualified at first, but eventually, I think, in such general terms that it did amount to an undertaking to the court to call the plaintiff. No ruling had as yet been obtained. In those circumstances, it seems to me that something was called for in the way of a direction. The jury, I think, should have been told that they had heard the undertaking given to call the plaintiff, subject always, of course, to the judge's ruling, and that therefore they must either ignore the evidence already given by the defence or wait until the ruling was asked for and obtained. It is said that that had no effect upon the verdict, having regard to the evidence already given by the plaintiff's own witnesses. But I confess that it seems to me impossible to reach that conclusion. For one thing—and this is, as it seems to me, the most cogent evidence—during Mr. Platts-Mills' speech and before any evidence was called, the jury asked if they could give a majority verdict. They were told that their verdict had to be unanimous, and it did not become unanimous until, as I have said, they had had a whole day of the defendants' witnesses. Quite apart from that, there remains the fact that they were told by Mr. Platts-Mills—and I need not refer to the passages again—that the burden was on the plaintiff to disprove the plea of justification, and they were invited to stop the case and award the plaintiff a farthing damages.

It seems to me that, taking those three matters together, it is impossible to say that that direction at that stage was an adequate direction to the jury. The only other thing I should like to say is that in my judgment no blame is to be attributed to the judge and I would associate myself entirely with the remarks that have fallen from my Lord, Singleton L.J., as to the conduct of counsel in these proceedings.

Appeal allowed.
No costs to either side in Court of Appeal and court below.

Solicitors: *C. Butcher & Simon Burns; Cyril Somper.*

A. W. G.

BOAKS *v.* REECE.

C. A.

1956
Nov. 26, 27.

Singleton, Jenkins and Parker L.JJ.

Justices—Remand—Jurisdiction—Summary offence not punishable by a sentence of imprisonment—Remand for medical report—Power of magistrates' court to remand in custody—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 14 (3) (4), 26 (1), 105 (1) (*a*).

The plaintiff, having been convicted of offences not punishable by imprisonment, was remanded in custody for a medical report pursuant to an order made by a magistrate under section 14 (3) of the Magistrates' Courts Act, 1952, and was detained in a prison hospital ward for seven days. The plaintiff claimed damages against the magistrate for wrongful imprisonment, alleging (inter alia) that the magistrate had jurisdiction to remand a person for that purpose only under section 26 of that Act, which applied only where the offence committed was punishable by imprisonment:—

Held, that section 16 of the Summary Jurisdiction Act, 1848, and section 25 of the Criminal Justice Act, 1948, conferred on courts of summary jurisdiction a general power to adjourn a case before and after conviction for the purpose of obtaining information or of determining the most suitable method of dealing with the case; that that general power was continued by section 14 (3) of the Magistrates' Courts Act, 1952, and the defendant magistrate had jurisdiction thereunder to remand the plaintiff in custody for inquiries of a medical character to be made. Section 26 of that Act, where applicable, was imperative in its effect.

Decision of Pilcher J. [1956] 1 W.L.R. 886; [1956] 2 All E.R. 750 affirmed.

APPEAL from Pilcher J.,[1] sitting with a jury.

On October 10, 1955, the plaintiff, Lt.-Commander William George Boaks, was convicted by Mr. Bertram Reece at Bow Street magistrates' court of offences under sections 6 and 72 of the Highway Act, 1835, and regulations 89 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. Neither of the offences was punishable by a sentence of imprisonment. The plaintiff, who was conducting a road courtesy campaign, had a number of previous convictions for similar offences, some of them before the same magistrate, and he intimated that it was his intention to continue his campaign. Before passing sentence the magistrate remanded him in custody for seven days for a medical report. Pursuant to the magistrate's order the plaintiff was taken in custody to Brixton Prison where, despite his refusal to be medically examined, he was detained, under observation, from October 3 to October 10, 1955, in the prison hospital ward.

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[1] [1956] 1 W.L.R. 886; [1956] 2 All E.R. 750.

The plaintiff claimed damages against the magistrate for wrongful imprisonment, alleging that he had been held in custody as a convicted person under section 26 of the Criminal Justice Act, 1948,[2] and section 26 of the Magistrates' Courts Act, 1952, for offences none of which were punishable by imprisonment.

By his defence the magistrate alleged that the order remanding the plaintiff in custody had been made pursuant to, and was authorized and rendered lawful by, sections 14 (3) and (4) and 105 (1) (*a*) of the Magistrates' Courts Act, 1952.[3]

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[2] Criminal Justice Act, 1948, s. 25 (1): "It is hereby declared that the "powers of a court of summary juris-"diction under section 16 of the Sum-"mary Jurisdiction Act, 1848, to "adjourn the hearing of a case in-"cludes power, after a person has "been convicted and before he has "been sentenced or otherwise dealt "with, to adjourn the case for the "purpose of enabling inquiries to be "made or of determining the most "suitable method of dealing with his "case . . ."

S. 26 (1): "Without prejudice to "any powers exercisable by a court "under the last foregoing section, "where a person is charged before a "court of summary jurisdiction with "an offence punishable on summary "conviction with imprisonment, and "the court is satisfied that the "offence has been committed by that "person but is of opinion that an "inquiry ought to be made into his "physical or mental condition before "the method of dealing with him is "determined, the court shall remand "him in custody or on bail . . . for "such period or periods, no single "period exceeding three weeks, as the "court thinks necessary to enable a "medical examination and report to "be made."

[Note.—These sections were repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6.]

[3] Magistrates' Courts Act, 1952, s. 14: ". . . (3) A magistrates' court may, "for the purpose of enabling inquiries "to be made or of determining the "most suitable method of dealing "with the case, exercise its power to "adjourn after convicting the accused "and before sentencing him or other-"wise dealing with him; but, if it "does so, the adjournment shall not "be for more than three weeks at a "time. (4) On adjourning the trial "of an information the court may "remand the accused and . . . shall "do so if—(*a*) the offence is not a "summary one; or (*b*) the court has "proceeded under section 18 (3) of "this Act to summary trial . . . "and, where the court remands the "accused, the time fixed for the re-"sumption of the trial shall be that "at which he is required to appear or "be brought before the court in pur-"suance of the remand."

S. 26 (1): "If, on the trial by a "magistrates' court of an offence "punishable on summary conviction "with imprisonment, the court is "satisfied that the offence has been "committed by the accused, but is "of opinion that an inquiry ought to "be made into his physical or mental "condition before the method of deal-"ing with him is determined, the "court shall adjourn the case to "enable a medical examination and "report to be made and shall remand "him; but the adjournment shall not "be for more than three weeks at a "time."

S. 105 (1): "Where a magistrates' "court has power to remand any per-"son, then, subject to any enactment "modifying that power, the court may "—(*a*) remand him in custody, that is "to say, commit him to custody to be "brought before the court at the end "of the period of remand . . ."

The jury found that the magistrate had not acted vindictively, had not, in remanding the plaintiff, mentioned any particular section of the Magistrates' Courts Act, 1952, and that the committal warrant signed by the magistrate had written on it "section 14 (3)."

Pilcher J. entered judgment for the defendant, and the plaintiff appealed.

W. G. Boaks (in person). The magistrate acted under section 26, and he was not entitled to do so. The jury found that the magistrate did not mention any section in giving judgment, but that the warrant was marked "section 14 (3)." That was a mere subterfuge. I never stop at a pedestrian crossing when the lights are clear unless there are pedestrians, who can claim precedence, still waiting to cross. The obstruction alleged was for less than a minute. I asked for bail, but it was refused. The magistrate could have made it a condition of granting bail that I submitted to a medical examination, and that he did not do so shows that it was part of the measures to keep me in prison. My methods may be crazy, but that is a very different thing from saying that I am crazy. It is against the will of Parliament to put in prison for medical examination a person charged with an offence not punishable by imprisonment. The magistrate was using under section 14 (3) a power which he had not got. I ask for justice.

H. J. Phillimore Q.C. and *Rodger Winn* for the defendant. The history of the relevant sections begins with the Criminal Justice Act, 1948, s. 25 (1), which gives power to a court of summary jurisdiction after conviction and before sentence "to "adjourn the case for the purpose of enabling inquiries to be "made or of determining the most suitable method of dealing "with his case." There is no question that before the Magistrates' Courts Act, 1952, the justices could have taken the action which Mr. Reece took. They had entirely general powers to remand. Section 28 of the Act of 1952 shows that the power to remand under section 14 (3) is a general power covering a report on an offender's mental condition. It is important that that can be done because there are a number of summary cases which do not carry imprisonment but where the justices do desire an inquiry into the offender's physical or mental condition and it is undesirable to grant bail.

W. G. Boaks in reply. It may be necessary to remand, but it is not necessary to remand to prison.

Singleton L.J. The plaintiff appeals against a judgment of Pilcher J., given upon the verdict of a jury on June 13, 1956. He claimed damages against the defendant for wrongful imprisonment. The claim came about in this way. The plaintiff has a motor-car upon which there are a number of placards or notices which direct attention to danger upon the roads. For some time he has pursued a campaign with a view to lessening that danger. Whether his way of doing that is right or wrong is neither here nor there, today. On October 1, 1955, he stopped his motor-car at the corner of Wellington Street and the Strand. A police officer wished him to proceed, as the lights were in his favour, but he did not do so; in the result a charge was preferred against him of wilfully obstructing the free passage of the highway by causing a crowd to assemble. The charge which was made against him was twofold: under the Highway Act, 1835, s. 72, where the offence of "wilfully obstructing the free passage of "any such highway" is punishable by a fine not exceeding 40 shillings, and under the Motor Vehicles (Construction and Use) Regulations, 1955, made under the Road Traffic Act, 1930, in which regulation 89 provides: "No person in charge of a motor "vehicle or trailer shall cause or permit the motor vehicle or "trailer to stand on a road so as to cause any unnecessary "obstruction thereof"; and the penalty for breach of that regulation is a fine not exceeding £20.

The case was heard before Mr. Bertram Reece on October 3. The magistrate came to the conclusion that the charge was proved. He was a little concerned when he found how many times the plaintiff had been before the court on a charge of that kind. He had been before Mr. Reece on several occasions. The magistrate, being satisfied that the case was established, had asked for the plaintiff's record. He found that he had a long list of previous convictions of a similar character and was rather puzzled how to deal with the matter, having regard to his duty to the public and to the plaintiff. He was impressed by the fact that the plaintiff claimed to be vested with some power to override the police in their control of the traffic on the highway and to disregard, whenever he pleased, the automatic traffic lights. His demeanour in the box showed that he did not intend to desist from his activities on the highway.

The magistrate, as he said, had to consider what was the appropriate approach to a case of a man with that record and outlook, and he decided to remand the plaintiff. He did not grant bail, with the result that the plaintiff was taken to Brixton

Prison, where he remained for seven days. He made application for release, but he remained there for seven days. He had objected to being medically examined and the medical officer had not found anything wrong in his mental condition. He was then taken back to Bow Street and again came before the same magistrate. He was determined not to desist from the course of conduct which he had pursued, whereupon the magistrate ordered a conditional discharge for 12 months. That having been done, the plaintiff commenced this action against the magistrate in which he claimed damages for false imprisonment. The defence admitted most of the facts alleged, and said in paragraph 4: "The said remand of the plaintiff in custody was made by the "defendant pursuant to and was authorized and rendered lawful "by the provisions of section 14 (3) and (4), and section 105 (1), "of the Magistrates' Courts Act, 1952."

When the case was heard before Pilcher J. and a jury in June, 1956, certain questions, agreed between the plaintiff and counsel for the defendant, were put to the jury: and these questions, in so far as they are of importance, were answered in favour of the magistrate. The jury found that at the time the magistrate signed the committal order the section under which the plaintiff was convicted was stated upon the committal order as section 14 (3) of the Magistrates' Courts Act, 1952, and that the magistrate was not vindictive. That last question had been put to them, I assume, at the request of the plaintiff. After the verdict of the jury the judge had to determine the point of law whether or not the magistrate had a right to remand the plaintiff in the circumstances and in the way in which he did.

Under section 14 of the Magistrates' Courts Act, 1952, a magistrate is given a general power to adjourn the trial of a case which is before him. [His Lordship read section 14 (3) and continued:] It is under that section that the magistrate claimed to have acted and was found by the jury to have acted. The plaintiff submitted to this court that the magistrate's order was made for the purpose of having a medical inquiry, and that section 14 of the Act of 1952 did not apply. He said that a remand for that purpose could only be made under section 26 of the Act of 1952, and then only if the offence which was charged was an offence punishable on summary conviction with imprisonment, and that neither of the offences of which he was accused before the magistrate was an offence punishable on summary conviction with imprisonment. Therefore the plaintiff claimed that the magistrate's order remanding him to Brixton Prison for a week was unlawful. Those are the matters that had to be considered.

On the legal position, it is right that I should look back into the history of this breach of the legislation and refer to the Summary Jurisdiction Act, 1848. Section 16 provided: "Before "or during such hearing of any such information or complaint "it shall be lawful for any one justice, or for the justices, "in their discretion, to adjourn the hearing of the same to a "certain time and place to be then appointed and stated in the "presence and hearing of the party or parties, or their respective "attornies or agents then present, and in the meantime the said "justice or justices may suffer the defendant to go at large, or "may commit him to the common gaol or house of correction, or "other prison, lock-up house, or place of security . . ." That section gave to the magistrates a general power to adjourn a case.

A question arose over the years whether that covered a right to adjourn the hearing after the defendant in such a case had been proved to be guilty to the satisfaction of the magistrate; and to set that matter at rest there was included in the Criminal Justice Act, 1948, just one hundred years later, section 25 of that Act, which is declaratory of the law. The section was headed: "Power of courts of summary jurisdiction to adjourn a case after "conviction and before sentence." [His Lordship read section 25 (1) and continued:] Thus, section 25 of the Act of 1948, read with section 16 of the Act of 1848, makes it clear beyond measure that the justices had, either before or after conviction, a right to adjourn a case, and that right extended to a right to adjourn for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. There is no question so far. [His Lordship read section 26 (1).] It will be observed that section 26 (1) puts an imperative duty upon the court. If the court is of opinion that inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, "the court *shall* remand him." That is more than a power: it is a direction.

The commencing words of section 26 are: "Without prejudice "to any powers exercisable by a court." There was no need for those words, in my view. The direction in section 26 of the Act of 1948 is something over and above the power given to the magistrates in the other section I have mentioned, and it does not take anything away from it.

Thereafter there came the Magistrates' Courts Act, 1952, which is a consolidating Act. I have already referred to section

14, but it is right that I should read subsections (1) and (3) to show what the state of the law is. Subsection (1) of section 14 provides: "A magistrates' court may at any time, whether "before or after beginning to try an information, adjourn the "trial, and may do so, notwithstanding anything in this Act, "when composed of a single justice." Subsection (3) provides: "A magistrates' court may, for the purpose of enabling inquiries "to be made or of determining the most suitable method of "dealing with the case, exercise its power to adjourn after "convicting the accused and before sentencing him or otherwise "dealing with him; but, if it does so, the adjournment shall not "be for more than three weeks at a time." It is under subsection (3) of section 14 that the magistrate dealt with the case of the plaintiff.

In his address to this court the plaintiff pointed out that this court owed a duty to the public to see that magisterial power was not abused. He said that that which had been done in his case was a monstrous power if it was used as it was, and that he was wrongfully deprived of his liberty. I cannot look upon the case in that way, for this reason. Section 14 of the Act of 1952—which is a combination of the powers given by the Summary Jurisdiction Act, 1848, and section 25 of the Criminal Justice Act, 1948—gives the magistrates, or a stipendiary or a metropolitan magistrate, certain powers of adjournment. It is not to be assumed that a magistrate will exercise lightly a power to remand in custody for a week or for three weeks a person who comes before him. But there are cases (and the magistrate seems to have thought this was one of them) where it is desirable, in the interests of the person before the court, as well as in the interests of the public, that proper inquiries should be made. Some instances were mentioned in argument before this court. Sometimes it occurs that a man who has led otherwise a perfectly good life is found guilty of insulting behaviour: if he commits the same type of offence again and again the magistrate may well think: "What is the use of a small fine each time? "Is there not something more that can be done to help the "man?" It may be that the man himself will not take advice of a kind that he ought to take. The magistrate under section 14 has power to remand him for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. He must not order a remand in custody for more than three weeks at a time. A magistrate who makes such an order realizes that he is depriving the one before him of his liberty for a period. No magistrate wants to do that in such a case. But if he comes to the conclusion that it is best in the interests of the man before him and of the public and of everyone that there should be a time given for inquiries to be made to help him, the magistrate, as to the best way of dealing with the case, that is a power given to him by Parliament, and he has a right to exercise it. It is not a power which is often exercised, I imagine; but sometimes a case arises. If a magistrate in such circumstances believes it his duty to take that course, I do not think that it can be described as an exercise of a "monstrous" power; it is a power given by Parliament.

The plaintiff disputes the right of the magistrate to make the order which he made under section 14 (3) of the Act of 1952. He drew our attention to section 26 of the same Act, and submitted that the power which was exercised by the magistrate was a power given by section 26 of the Act, but that it could only be exercised if the offence was one punishable on summary conviction with imprisonment, which was not this case. It was pointed out that section 26 did not include at its commencement the words "Without prejudice to any powers exercisable by a "court under the last foregoing section," as section 26 of the Criminal Justice Act, 1948, did. So it was argued that the course which was taken could only be taken if the conditions of section 26 were fulfilled, and they were not.

In other words, the argument was that in view of section 26 of the Act of 1952, section 14 really had no bearing and could not be used. I do not accept that argument. Section 14 of the Act of 1952 preserves the right to adjourn which the magistrates had before the Act of 1952 was passed. Section 26 of the Act of 1952 is, and section 26 of the Act of 1948 was, an imperative section: it places a duty upon the magistrates to adjourn in a case punishable on summary conviction with imprisonment, if the magistrates are of opinion that an inquiry ought to be made into the physical or mental condition of the man. If they have formed the opinion that a physical and mental examination is necessary, they must not deal with the case until that examination is made.

I have said already that the words which appear at the commencement of section 26 of the Act of 1948—"Without "prejudice," etc.—were, in my view, unnecessary. They are omitted from section 26 of the Act of 1952. The position is that there remains a general power to order an adjournment of a case for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. That is what was done. Under section 26 there is an imperative duty to adjourn a case in the events set out in that section. The one does not disturb or destroy the other.

In my opinion the judge was right, upon the verdict of the jury, to enter judgment for the magistrate. The plaintiff has conducted his case in this court with propriety in every way, but I am satisfied that his appeal fails and should be dismissed.

Jenkins L.J. I agree. The findings of the jury on the five questions put to them dispose of the plaintiff's primary contention to the effect that the order remanding him in custody was made without jurisdiction, in that it was made under section 26 (1) of the Act of 1952, and the jurisdiction under that provision only arose in the case of offences punishable on summary conviction with imprisonment. The offences with which the plaintiff was charged did not answer that description; but it must now be taken, having regard to the jury's findings, that the plaintiff was in fact remanded in custody by an order made under section 14 (3) of the Act of 1952. The appeal therefore resolves itself into the narrow point whether the magistrate had jurisdiction to make that order under section 14 (3), read in conjunction with subsection (4) of the same section and section 105 of the same Act.

My Lord has gone fully into the relevant legislation leading up to section 14 (3), and for the reasons he has given (to which I cannot usefully add anything) I agree that the order complained of by the plaintiff was made with jurisdiction, and consequently that his claim that the order was a nullity, with the result that he was committed to prison under an order which had not been validly made, must fail; and it follows that this appeal should be dismissed.

I should perhaps add that this court is in no way concerned with the merits or demerits of the plaintiff's views as to the management of traffic. The sole question before us is the pure question of law whether he was rightfully or wrongfully remanded in custody—that is to say, whether the order was made with jurisdiction or not. In my view it was made with jurisdiction, and the appeal fails for that reason.

Parker L.J. I entirely agree, and I will only add a few words lest the plaintiff should feel that this court has not fully appreciated his points. So far as the main point is concerned, I entirely agree with what my Lords have said, and I would only add that it seems to me that section 28 of the Magistrates' Courts Act, 1952, puts the matter beyond all doubt. That is a section dealing with the power of magistrates to commit to quarter sessions with a view to a Borstal sentence. Subsection (2) provides: "Before committing any person for sentence under "this section, the court shall consider any report or representa- "tions made by or on behalf of the Prison Commissioners on the "offender's physical and mental condition and his suitability for "a sentence of Borstal training; and if the court has not received "such a report or representations it shall after conviction adjourn "the hearing in accordance with subsection (3) of section fourteen "of this Act and remand the offender in custody to enable the "report or representations to be made." It seems clear, therefore, that that subsection recognizes that in certain cases a remand for a medical report may be made under section 14 (3).

So much for that point. As I understand it, the plaintiff takes two further points. The first one (which strictly, I think, is not covered by the grounds of appeal) is this, that, there being power under subsection (4) of section 14 to remand a defendant when an adjournment is made under subsection (3), and there being power under section 105 of the Act, when such a remand is made, to remand a man on bail, the magistrate ought in this case to have remanded him on bail on condition that he subjected himself to medical examination. The plaintiff puts it somewhat forcefully; he says: "Here is a case in which I could only be fined, "and that to a maximum of £20, and here I was put in prison." The answer to that is clear, that the magistrate had power to do what he did: it was within his discretion to remand the defendant in custody or on bail. If, of course, the magistrate failed to give the plaintiff an opportunity to be put on bail because of some vindictive motive, that would be clearly an abuse of power, but the jury here have negatived any such view.

The other point which the plaintiff takes is that there was a misdirection by the judge in his summing-up to the jury. [His Lordship considered that point, continuing:] I can see no misdirection by the judge, and, accordingly, that point also fails. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Treasury Solicitor.*

A. W. G.

ANDREWS *v.* HOPKINSON.

1956
July 2, 3,
30.

McNair J.

[1954 A. No. 53.]

Sale of Goods—Warranty—Hire-purchase agreement—Sale of second-hand car—Dealer's express warranty of condition to buyer—Car in dangerous condition sold by dealer to finance company—Hire-purchase agreement between company and buyer—Buyer injured in collision caused by dangerous condition of car—Breach of warranty—Enforceability against dealer—Measure of damages—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1).

Negligence—Dangerous thing—Car in dangerous condition—Condition discoverable by reasonable diligence on the part of supplier—Buyer injured in collision—Liability of supplier.

The plaintiff, being minded to buy a car, visited the premises of a dealer in second-hand cars and was shown by the sales manager a 1934 saloon car which had been in his possession for about a week. The manager said: "It's a good little bus. I would stake my life "on it. You will have no trouble with it." The price was agreed and it was arranged that the plaintiff should pay a deposit and that the balance should be payable on hire-purchase terms. On the following day an agreement was signed to sell the car to a finance company and a hire-purchase agreement was executed in the usual form between the finance company and the plaintiff. The dealer had no reason to anticipate that the plaintiff would have the car examined by a competent mechanic before taking it on the road or would himself examine it. A week after the transaction the plaintiff was injured when his car came into collision with a lorry owing to failure of the drag-link joint of the steering which was not safe or fit for use on the highway. The defective condition of the joint was of long standing and, though probably not discoverable by an ordinary owner-driver, could have been simply discovered by any competent mechanic, and a motor dealer should have appreciated that in such a car this joint was one of the most likely places to find excessive and dangerous wear.

In an action by the plaintiff against the dealer for damages for breach of warranty and negligence:—

Held, (1) that if the relationship between the dealer and the plaintiff had been that of seller and buyer the words used could properly be held to be words amounting at least to a warranty that the car was in good condition and reasonably safe and fit for use on a highway.

Crosse v. *Gardner* (1688) Carth. 90 and *Medina* v. *Stoughton* (1700) 1 Salk. 210 applied.

(2) That the plaintiff, though not a purchaser from the dealer, had acted on this warranty in entering into the hire-purchase agreement and could enforce the warranty against the dealer.

[Reported by G. M. SMAILES, Barrister-at-Law.]

Brown v. *Sheen and Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102 and *Shanklin Pier Ltd.* v. *Detel Products Ltd.* [1951] 2 K.B. 854; [1951] 2 All E.R. 471 applied.

(3) That as to damages for breach of the warranty the plaintiff was entitled not only to the difference in value of the car as warranted and its value as delivered but also to damages for his personal injuries which were a direct and natural result of the breach.

(4) That as the dealer had put into circulation in the hands of his customer a car which was in a dangerous condition when the defect rendering the condition dangerous could and ought to have been discovered by reasonable diligence on his part, and had no reasonable anticipation that it would be examined by or on behalf of the customer before use, he was guilty of negligence in failing to make the necessary examination or failing to warn the plaintiff that no such examination had been carried out, and was accordingly also liable in negligence for the like damages.

Herschtal v. *Stewart & Ardern Ltd.* [1940] 1 K.B. 155; 56 T.L.R. 48; [1939] 4 All E.R. 123 applied.

Observations made on whether in such a transaction a court ought also to imply a condition or warranty similar to that arising under section 14 (1) of the Sale of Goods Act, 1893, if a contractual relationship between the parties can be established.

ACTION.

The plaintiff, George Alwynn Andrews, was in 1952 a commercial traveller employed on house-to-house sale of drapery. On September 11 he was minded to acquire a small car for private and business purposes, and paid a visit to the Doncaster premises of the defendant, Frank Hopkinson, who carried on the business of a dealer (inter alia) in second-hand cars. Being himself without any mechanical knowledge, he took with him a friend, Mr. Bilby, who was himself the owner of a car, but otherwise in no sense an expert. At Doncaster the plaintiff saw Mr. Frank Hopkinson, junior, the sales manager, and explained that he wanted a small second-hand car costing about £100. Mr. Hopkinson said that he had just the thing at the Rotherham branch and he would arrange for the car to be brought over straightaway, saying "You will "like it when you see it."

When the car arrived it turned out to be a small Standard saloon car of the year 1934. The plaintiff and Mr. Bilby were taken out for a short run of four or five miles by the driver, who said that it had given no trouble on the run from Rotherham to Doncaster.

Either before or after the trial run Mr. Hopkinson, after pointing out the good points, said: "It's a good little bus; I "would stake my life on it; you will have no trouble with it";

and the plaintiff said in evidence—and his evidence was accepted by the judge—that he had no mechanical knowledge, that he believed what Mr. Hopkinson said about the car, and bought it in good faith and expected it to be sold in good faith.

At this interview on September 11, the price was agreed at £120, and as Mr. Andrews had not this sum available, it was arranged that on the next day he should pay a deposit of £50, and that the balance should be payable on hire-purchase terms. Mr. Hopkinson, junior, agreed to have the car insured for the plaintiff with the White Cross Insurance Company, and for that purpose undertook to arrange for an engineer's report to be prepared for submission to the proposed insurers. However, the next day the plaintiff, having learned that he could get cover cheaper elsewhere, cancelled these instructions. Before the instructions had been cancelled an engineer employed by the defendant for the purpose of preparing such report made a preliminary inspection of the car. This inspection included the testing of the steering wheel for excessive play, though none was found. The engineer did not jack the car up, but upon being told that the plaintiff had cancelled the proposal for insurance with the White Cross Company, did not carry out a full inspection and did not complete his report. On September 12 the plaintiff paid to the defendant a deposit of £50, and the formal hire-purchase documents were executed in the familiar form. These consisted of: (1) an agreement to sell the car to the Berkeley Finance Co. Ltd.; (2) a hire-purchase agreement between the Berkeley Finance Co. Ltd. and the plaintiff under which the former agreed to hire the car to the latter for a period of 18 months with an option for the hirer to purchase the car for 5s. on completion of the hiring. The schedule to this agreement set out the following material terms:

	£	s.	d.
Cost of vehicle	120	0	0
Initial payment	50	0	0
Amount on which charges based ...	70	0	0
Charges	10	10	0
Balance of hire	80	10	0
Payment by 18 monthly rentals ...	4	9	6
Period of hire	18 months.		

Clause 1 of the agreement also provided that the hirer's acceptance of delivery should be conclusive that the vehicle was complete and in good order and condition and in every way satisfactory. The third document signed by the plaintiff was the delivery note by which he acknowledged to have taken delivery of the vehicle the subject of the hire-purchase agreement dated September 12, 1952, and was satisfied as to its condition.

After completing the formalities the plaintiff arranged for a friend to collect the car and drive it to his home, as at that time he had no licence. At the week-end the plaintiff was driven to Skegness and back in the car, a journey of 150 miles, and nothing untoward happened. The car was not further used until September 19, when the plaintiff, having then obtained a provisional licence, first drove the car himself. After making a number of calls and driving about five miles, he was involved in a serious collision with a lorry, about which he remembered nothing; while being driven on the main road in good weather, the surface dry, and while proceeding on its proper side of the road, his car suddenly swerved towards the lorry and collided with it. The explanation of the cause of this accident was put beyond doubt the next day when the steering mechanism was examined by a police sergeant, a member of the County Police Department concerned with the examination of motor-vehicles. His examination disclosed that the drag-link joint of the steering mechanism had failed owing to the badly worn condition of the socket and the ball pin which the socket is designed to hold in position. If the ball pin, which is itself connected with the steering arm, slips from the socket, the whole steering mechanism fails. The police sergeant's examination showed that at some time one of the pressure springs, which together hold the two halves of the ball cups together round the ball pin itself, had broken and been replaced by a weaker spring, part of the play being taken up by a nut and washer. All the steering joints were dry and rusty and showed a serious lack of lubrication, and an oil nipple and split pin were also missing.

As a result of the accident the car was wrecked and the plaintiff suffered serious injuries involving the fracture of three ribs and a fracture of the left wrist. He brought an action against the defendant, basing his claim on three grounds: (1) that in the circumstances the defendant warranted that the car was in good condition and reasonably safe and fit for use on the public highway, that he acted on this warranty and that damage was caused by breach of the warranty; (2) that the collision was caused by the defendant's negligence, particularly by that set out in paragraph 6 of the statement of claim, that the defendant knew, or ought to have known, that the car was defective and therefore dangerous and unfit for use on a highway, and that the defendant failed to take any or sufficient steps to remedy this defect to ensure that the car was reasonably safe and fit to use on a public highway, and failed to warn the plaintiff that the car was defective and dangerous and unfit to be used on a public highway; (3) (by way of amendment made at a late stage of the hearing) the plaintiff relied on an implied warranty similar to that implied in certain cases of sale of goods under section 14 (1) of the Sale of Goods Act, 1893.

The defendant denied liability.

W. H. Greenwood for the plaintiff. This case falls within the principle laid down in *Brown* v. *Sheen and Richmond Car Sales Ltd.*[1] The words used by the defendant's agent amounted to a warranty that the motor-car was reasonably fit for use on the highway. It was clearly not fit to be so used and the damage suffered by the plaintiff is the direct consequence of the defect in the motor-car. The defendant is also liable in negligence because he could not reasonably have anticipated that the plaintiff would examine the motor-car before using it, and the defendant was therefore under a duty to examine it himself. He failed to discover a defect which he ought to have discovered.

J. F. S. Cobb for the defendant. The words alleged to have been used did not amount to a warranty. Before a warranty can be found both parties must have intended the words as such, and here the words were no more than sales talk or "puffing." No duty of care was owed by the defendant. The principle of *Donoghue* v. *Stevenson*[2] ought not to be extended to include vendors of articles such as motor-cars who know nothing of defects therein. Although many similar cases must have arisen in the past there is no reported case in which a second-hand trader has been held liable on this principle. If a duty of care was owed, then the breach of duty was not a cause of the damage suffered. The car had been in the plaintiff's possession for about nine days and had travelled 150 to 200 miles. The facts in this case are to be distinguished from those in *Herschtal* v. *Stewart & Ardern*

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[1] [1950] 1 All E.R. 1102.

[2] [1932] A.C. 562; 48 T.L.R. 494.

Ltd.,[3] where a wheel came off the car on the morning after the sale: see the observations of Tucker J.[4]

Cur. adv. vult.

July 30. McNAIR J., reading his judgment, stated the facts substantially as set out above, and continued: On the evidence given before me I am satisfied (1) that the defective condition of the drag-link joint was the cause of the accident; (2) that this condition was of long standing; (3) that at the time when the plaintiff took delivery of the car it was, by reason of these defects, not in good condition and safe and fit for use on a public highway; (4) that this defective condition could have been discovered by any competent mechanic (though probably not by an ordinary owner-driver) without stripping down the steering mechanism, by the simple and recognized method of manually pulling upon the ball pin after jacking up the car for examination; (5) that any motor dealer ought to appreciate that in the case of an old car such as the car in question, one of the most likely places to find excessive and dangerous wear affecting the roadworthiness is in the steering mechanism, and particularly in the drag-link joint where such joint forms part of the steering mechanism; (6) that the defendant had no reason to anticipate that the plaintiff would himself have the car examined by a competent mechanic before taking it on the road, or would himself examine it.

As a result of this accident the car was wrecked and the plaintiff suffered serious injuries involving the fracture of three ribs and a fracture of the left wrist. Happily the fractures united well and there was no residual disability. He was off work for seven or eight weeks. The special damages have been agreed at £245 5s. 6d. and I assess the general damages at the sum of £400.

In these circumstances the plaintiff brings his action against the defendant, basing his claim upon three grounds. He first claims that in the circumstances which I have narrated the defendant warranted that the car was in good condition and reasonably safe and fit for use on the public highway; that he acted on this warranty, and that damage was caused by breach of that warranty. Secondly, he claims that the collision was caused by the negligence of the defendant, particularly by the negligence set out in paragraph 6 of the statement of claim, that the defendant knew, or ought to have known, the said car was defective and therefore dangerous and unfit for use on a highway, and that the defendant failed to take any or sufficient steps to remedy this defect to ensure the car was reasonably safe and fit to use on a public highway; failed to warn the plaintiff that the car was defective and dangerous and unfit to be used on a public highway. Thirdly, by way of amendment made at a late stage of the hearing, the plaintiff relied on the implied warranty similar to that implied in certain cases of sale of goods under section 14 (1) of the Sale of Goods Act, 1893.

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[3] [1940] 1 K.B. 155.

[4] Ibid. 159.

As to breach of warranty, in the first place it is clear that in law the relationship between the plaintiff and the defendant was not a relationship of seller and purchaser. The hire-purchase transaction evidenced in the documents was a reality and cannot be treated as a mere colourable transaction: see *Drury* v. *Victor Buckland Ltd.*[1]

Secondly, I am satisfied (1) applying the principle stated by Holt J. in *Crosse* v. *Gardner*[2] and *Medina* v. *Stoughton*,[3] that if the transaction between the plaintiff and defendant had been in law a sale, the words deposed to by the plaintiff as being the words used by Mr. Hopkinson, junior, could properly be held to be words of warranty, i.e., an affirmation made at the time of sale intended to be a warranty; (2) that the words amounted at least to a warranty that the car was in good condition and reasonably safe and fit for use on a public highway; and (3) that the plaintiff acted upon this warranty in the sense that without it he would not have accepted delivery of the car or entered into the hire-purchase agreement.

On these findings I adopt the reasoning of Jones J. in *Brown* v. *Sheen and Richmond Car Sales Ltd.*,[4] and follow my own decision in *Shanklin Pier Ltd.* v. *Detel Products Ltd.*,[5] where I set out at some length the reasons that led me to the conclusion (as they do in this case) that there may be an enforceable warranty between A, the intended purchaser of a car, and B, the motor dealer, supported by the consideration that B should cause the hire-purchase finance company to enter into a hire-purchase agreement with A, the intended purchaser.

It was rather faintly argued that even on these findings the defendant would only be liable for the difference in value between the car as delivered and the car as warranted. Though this, no doubt, may be the prima facie measure of damages in an ordinary case of breach of warranty in the sale of goods, I feel no doubt at all that on the facts of this case the whole of the damages can fairly be considered as loss directly and naturally resulting in the ordinary course of events from the breach of warranty and so recoverable as damages for breach. I hold, accordingly, that as damages for breach of warranty the plaintiff is entitled to judgment for £645 5s. 6d.

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[1] [1941] 1 All E.R. 269.

[2] (1688) Carth. 90.

[3] (1700) 1 Salk. 210.

[4] [1950] 1 All E.R. 1102.

[5] [1951] 2 K.B. 854; [1951] 2 All E.R. 471.

Though this conclusion is sufficient to dispose of this action in the plaintiff's favour, it is right that I should also state my views upon the second ground of complaint, namely, negligence. In *Herschtal* v. *Stewart & Ardern Ltd.*[6] Tucker J. held that motor dealers who supplied for the plaintiff's use on hire-purchase terms a car which they themselves had repaired, were liable to the plaintiff for personal injuries which he suffered when the near rear wheel of the car came off owing to faulty workmanship on the part of the defendant motor dealers' staff in the reconditioning of the car. The basis of this decision was that as the motor dealers were supplying a motor-vehicle to their customer for his own use, the very close proximity or relationship between them was such as to impose a duty on motor dealers to take reasonable care to see that the article which they were delivering, knowing that the customer was going immediately to put it on the road, was not in a condition whereby a wheel might come off causing possibly very serious and grave damage. The judge, after an elaborate review of the authorities including and following upon *Donoghue* v. *Stevenson*,[7] further held that the test of liability in such a case depended on whether or not it could be reasonably anticipated that the car would be examined by the party taking it, or other third party, before being put on the road, and not on whether such examination was possible. Though in *Herschtal's* case[8] the negligence relied upon was negligence in actually effecting the repair, I see no reason why the motor dealer in the absence of such reasonable anticipation should not equally be held liable if he puts into circulation in the hands of his customer a motor-car which is in fact in a dangerous condition when the defect rendering the condition dangerous consists of a defect which could and ought to have been discovered by reasonable diligence on his part.

There was before me abundant evidence that in the case of an old car such as this the danger spot is in the steering mechanism and that this particular defect could have been discovered by a competent mechanic if the car had been jacked up. No such examination was in fact carried out, though the defendant, who had taken the car in part exchange, had had the car in his possession for a week or so. Having regard to the extreme peril involved in allowing an old car with a defective steering mechanism to be used on the road, I have no hesitation in holding that the defendant in the circumstances was guilty of negligence in failing to make the necessary examination, or at least in failing to warn the plaintiff that no such examination had been carried out. The defendant is accordingly also liable for negligence for the like damages.

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[6] [1940] 1 K.B. 155; 56 T.L.R. 48; [1939] 4 All E.R. 123.

[7] [1932] A.C. 562; 48 T.L.R. 494.

[8] [1940] 1 K.B. 155.

As to the third ground, namely, the implied warranty, I think it is sufficient to say that I do not feel disposed in this case, where I have decided in favour of the plaintiff on two independent grounds, to examine this head of claim exhaustively. In *Drury* v. *Victor Buckland Ltd.*[9] the Court of Appeal rejected the claim of the plaintiff who had taken goods from the defendants on hire-purchase terms to rely upon the implied warranty arising under section 14 of the Sale of Goods Act, 1893, on the ground that the transaction between the parties was not a transaction of sale, and that accordingly the Sale of Goods Act did not apply. In *Herschtal's* case[10] Tucker J. also rejected a claim based upon implied warranty on the ground that there was no contract between the parties. Both these decisions were before the decision of Jones J. in *Brown* v. *Sheen and Richmond Car Sales Ltd.*,[11] where a contractual relationship was found to exist on a principle not apparently advanced or considered in either of the two earlier cases. Bearing in mind that the statutory implied warranty now embodied in section 14 (1) of the Sale of Goods Act, 1893, was merely a modification of the long existing common law in relation to sales, I feel there is much to be said for the view that in a transaction such as the present, which though not in law a transaction of sale between the parties, is closely akin to such a transaction, the court ought to imply such a condition or warranty if any contractual relationship between the parties can in fact be established. I prefer, however, not to rest my judgment on this view.

Judgment for the plaintiff.

Solicitors: *R. Stanley Pennington, Doncaster; J. W. Fenoughty, Dunn & Co., Rotherham.*

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[9] [1941] 1 All E.R. 269.

[10] [1940] K.B. 155.

[11] [1950] 1 All E.R. 1102.

1956
Nov. 8.

Lord Goddard
C.J.

CHURCH COMMISSIONERS FOR ENGLAND *v.* VE-RI-BEST MANUFACTURING CO. LTD.

[1956 C. No. 611.]

Landlord and Tenant—Repairs—Act of 1938*—Mortgage—Leasehold—Mortgage by way of legal charge—Proceedings for forfeiture for breach of covenant—Notice of breach served on tenant and mortgagee—Counter-notice by mortgagee claiming benefit of Leasehold Property (Repairs) Act,* 1938*—No counter-notice by tenant—Proceedings for forfeiture against tenant commenced without leave of the court—Whether obligation to serve mortgagee—Whether tenant entitled to invoke mortgagee's counter-notice—"Lessee"—Law of Property Act,* 1925 (15 & 16 *Geo.* 5, *c.* 20), *ss.* 87, 146*—Leasehold Property (Repairs) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 34), *s.* 1.

Mortgage—Leasehold, of.

In November, 1946, the defendants, the tenants of premises demised by a lease made in 1898 for a term of 78½ years from March 25, 1898, mortgaged the premises by way of legal charge to secure an advance. In June, 1955, the landlords served on the tenants and on the mortgagees a notice pursuant to section 146 of the Law of Property Act, 1925, alleging breach by the tenants of certain repairing covenants in the lease and requiring the same to be remedied within six months. In accordance with the provisions of section 1 (4) of the Leasehold Property (Repairs) Act, 1938, the notice contained a statement to the effect that a counter-notice claiming the benefit of that Act might be served. On July 20, 1955, the mortgagees served on the landlords a counter-notice claiming the benefit of the Act of 1938. No counter-notice was served by the tenants and on March 1, 1956, the landlords, without first obtaining the leave of the court, issued a writ against the tenants claiming damages for breach of covenant and possession. The tenants objected to the proceedings as being improperly constituted and invalid on the ground that the mortgagees were "a lessee" for the purposes of section 1 (3) of the Leasehold Property (Repairs) Act, 1938, and the counter-notice served by the mortgagees precluded the landlords from bringing the proceedings without the leave of the court:—

Held, that a mortgagee by legal charge was to be regarded as included in the term "lessee" for the purposes of both section 146 of the Law of Property Act, 1925, and section 1 of the Leasehold Property (Repairs) Act, 1938, but that there was no obligation to serve a notice of breach of covenant on a mortgagee and that, therefore, since the landlords had served notice upon the tenants who were "the lessee" in possession, the tenants, who had chosen not to serve a counter-notice, could not, in an action against them by the landlords, take advantage of the fact that the mortgagees, who were not and had no right to be a party to the action, and who had no right to receive a notice, had also been served and had served a counter-notice; accordingly, there was no need for the landlords to obtain the leave of the court under section 1 (3) of the Act of 1938 before bringing the proceedings.

PRELIMINARY POINT OF LAW.

The plaintiffs, the Church Commissioners for England, were landlords of premises, numbers 1 to 18, Westminster Mansions, which were let under a lease, dated July 18, 1898, granted by the predecessors in title of the plaintiffs, for a term of 78½ years from March 25, 1898, the residue of which was vested in the defendants, the Ve-Ri-Best Manufacturing Company Ltd. The lease contained, inter alia, covenants by the lessee to keep the premises in good and substantial repair, and a proviso for re-entry by the landlords in the case of breach or non-compliance by the lessee with any of the covenants or conditions in the lease.

On November 29, 1946, the defendants charged the premises by way of legal mortgage in favour of the Hastings and East Sussex Building Society as security for an advance of £13,000. On June 29, 1955, the plaintiffs served upon both the defendants and the building society a notice pursuant to section 146 of the Law of Property Act, 1925,[1] alleging breaches of the repairing covenants in the lease and requiring them to be remedied within six months or £954 4s. 11d. to be paid in compensation for the same. The notice was addressed to the defendants, to the Hastings and East Sussex Building Society and to "whom else "it may concern" and the last paragraph contained the statement "Under the provisions of the Leasehold Property (Repairs) "Act, 1938,[2] you are entitled to serve on the Commissioners a "counter-notice claiming the benefit of that Act. Such counter-"notice to be served within 28 days. . . ." The defendants did not serve any counter-notice under the Leasehold Property (Repairs) Act, 1938, but on July 20, 1955, the building society served on the plaintiffs a notice claiming the benefit of the Act.

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[1] Law of Property Act, 1925, s. 87: "(1) Where a legal mortgage of "land is created by a charge by deed "expressed to be by way of legal "mortgage, the mortgagee shall have "the same protection, powers and "remedies . . . as if . . . (*b*) where "the mortgage is a mortgage of a "term of years absolute, a sub-term "less by one day than the term "vested in the mortgagor had been "thereby created in favour of the "mortgagee."

S. 146: "(1) A right of re-entry "or forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in the "lease shall not be enforceable, by "action or otherwise, unless and "until the lessor serves on the lessee "a notice—(*a*) specifying the particular breach complained of; and "(*b*) if the breach is capable of "remedy, requiring the lessee to "remedy the breach; and (*c*) in any "case, requiring the lessee to make "compensation in money for the "breach . . . (4) Where a lessor is "proceeding by action or otherwise "to enforce a right of re-entry or "forfeiture under any covenant, "proviso, or stipulation in a lease, ". . . the court may, on application "by any person claiming as under-"lessee any estate or interest in the "property comprised in the lease . . . "either in the lessor's action (if "any) or in any action brought "by such person for that purpose, make an order vesting, for "the whole term of the lease or any "less term, the property comprised "in the lease . . . in any person "entitled as under-lessee to any "estate or interest in such property "upon such conditions . . . as the "court . . . may think fit. (5) For "the purposes of this section—. . . "(*b*) 'Lessee' includes an original "or derivative under-lessee, and the "persons deriving title under a "lessee; . . ."

On March 1, 1956, the plaintiffs, without having obtained leave of the court under section 1 (3) of the Act of 1938, issued a writ against the defendants claiming damages for breach of the repairing covenants and possession. The building society, having served the counter-notice, took no further steps and were not parties to the action, but the defendants by their defence, inter alia, objected to the proceedings as being improperly constituted and invalid and of no effect in that they were commenced by the plaintiffs without leave of the court; they also denied breaches of covenant and further, by way of counter-claim, prayed for relief from forfeiture.

The issue of law raised by the defendant's contention that the proceedings were improperly constituted was directed to be tried as a preliminary issue.

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[2] Leasehold Property (Repairs) Act, 1938, s. 1 (as amended by the Landlord and Tenant Act, 1954, s. 51 (2)): "(1) Where a lessor "serves on a lessee under sub-"section (1) of section 146 of "the Law of Property Act, 1925, "a notice that relates to a breach "of a covevant . . . to . . . repair ". . . and at the date of the service "of the notice three years or more "of the term of the lease remain "unexpired, the lessee may within "28 days from that date serve on the "lessor a counter-notice to the effect "that he claims the benefit of this "Act . . . . (3) Where a counter-"notice is served by a lessee under "this section, then, notwithstanding "anything in any enactment or rule "of law, no proceedings, by action "or otherwise, shall be taken by the "lessor for the enforcement of any "right of re-entry or forfeiture under "any . . . stipulation in the lease "for breach of the covenant . . . in "question, or for damages for breach "thereof, otherwise than with the "leave of the court. (4) A notice "served under subsection (1) of "section 146 of the Law of Property "Act, 1925, in the circumstances "specified in subsection (1) of this "section . . . shall not be valid "unless it contains a statement, in "characters not less conspicuous "than those used in any other part "of the notice, to the effect that the "lessee is entitled . . . to serve on "the lessor a counter-notice . . ."

S. 7. "In this Act the expressions "'lessor,' 'lessee' and 'lease' have "the meanings assigned to them "respectively by sections 146 and 154 "of the Law of Property Act, "1925 . . ."

Reginald Goff Q.C. and *Morris Finer* for the defendants. The building society had a right to serve a counter-notice under section 1 of the Leasehold Property (Repairs) Act, 1938. Section 7 defines "lessee" by reference to sections 146 and 154 of the Law of Property Act, 1925, and a "lessee" therefore is "an "original or derivative under-lessee, and the persons deriving "title under a lessee." That definition includes a mortgagee by sub-demise, and section 87 of the Law of Property Act, 1925, gives to a mortgagee by legal charge the "same protection, "powers and remedies" as if a sub-term had been created in his favour, so that he is in the same position for protecting his security as if he were a mortgagee by sub-demise: see *Grand Junction Co. Ltd.* v. *Bates.*[3] The building society, therefore, was a lessee under section 1 of the Act of 1938 and as such, having been served with notice, had a right to serve the counter-notice. By section 1 (3), the effect of the counter-notice is to place an absolute bar on proceedings for forfeiture unless the leave of the court has been obtained.

The present action, though in form between the plaintiffs and the defendants, is one affecting the title of the mortgagee. Although a mortgagee may intervene under section 146 of the Law of Property Act, 1925, relief under that section may only be granted on terms; further, such relief cannot be obtained once the lessor has completed his action. An action for forfeiture, where the mortgagee is not joined, is properly constituted, and operates to destroy the title of the mortgagee, nor is there any obligation to serve a mortgagee under section 146: *Egerton* v. *Jones.*[4] Where a third person who might be affected by an action takes steps to bar the action, then it is submitted that the bar is absolute, whether or not the third person takes any further steps.

[LORD GODDARD C.J. That might be so if the plaintiffs were under a legal obligation to serve the mortgagee, but if the mortgagee is not entitled to receive a notice, cannot his counter-notice be ignored?]

It is conceded that there was no obligation on the plaintiffs to serve notice on the building society, but the building society was in fact served and the question whether or not the counter-notice in the circumstances is effective does not depend upon the obligation to serve. Contrast the wording in section 146 (1) of the Law of Property Act, 1925, "serves on *the* lessee" with that in section 1 (1) of the Leasehold Property (Repairs) Act, 1938,

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[3] [1954] 2 Q.B. 160.

[4] [1939] 2 K.B. 702; 55 T.L.R. 1089; [1939] 3 All E.R. 889.

" where a lessor serves on *a* lessee "; section 1 (3) of the Act of 1938 provides that " where a counter-notice is served by *a* lessee " the leave of the court is required before action can be brought. The landlords themselves in serving the building society, which is " *a* lessee," brought the section into operation and gave the building society the right to serve a counter-notice. That counter-notice imposed an absolute bar precluding the landlords from bringing these proceedings without the leave of the court and the defendants, accordingly, are entitled to take advantage of it.

R. E. Megarry Q.C. and *Felix Denny* for the plaintiffs. The prohibition against suing without leave of the court, which section 1 (3) of the Leasehold Property (Repairs) Act, 1938, imposes, is in terms confined to cases where a counter-notice is served " under this section." This refers back to subsections (1) and (2) of section 1 and excludes cases where those subsections do not authorize the service of a counter-notice. Those subsections provide for the service of a counter-notice only if a notice under section 146 of the Law of Property Act, 1925, has been served on " a lessee " (see subsection (1), at the first reference) or " the " lessee " (see subsection (1), at the second reference, and subsection (2)). There is no significance in the distinction between " a " and " the." The difference is merely grammatical, for at the first reference in subsection (1) there has been no prior mention of a lease, whereas in subsection (2) there has. If Parliament had intended a significant distinction on the point, it is unlikely that it would have entrusted that intention to so frail a carrier.

It is agreed that for the purposes of both section 1 of the Act of 1938 and section 146 of the Act of 1925, " lessee " is defined in terms which include underlessees and those deriving title under a lessee, but this does not mean that a notice must be served on every person who can bring himself within the definition. All that it means is that in the case of a lease, notice must be served on the lessee; in the case of an underlease, on the underlessee; in the case of a derivative underlease, on the derivative underlessee; and so on. [Reference was made to Woodfall's Law of Landlord and Tenant, 25th ed. (1954), p. 1008.] Otherwise if the lessee of a block of 100 flats committed a breach of covenant, notices would have to be served not only on him but also on the underlessee or subtenant of each flat. It would also mean that if an underlessee was proceeding against a sub-underlessee, notice would have to be served on the head lessee, on the ground that he was a " lessee." It is agreed that notice may have to be served on a mortgagee in possession, but there is no need to serve it on a mortgagee out of possession. The defendants' concession that there was no obligation to serve the building society is thus conclusive against them. "Lessee" has the same meaning throughout section 1 of the Act of 1938, and "a lessee" whose counter-notice under section 1 (3) inhibits proceedings without leave of the court must be the same as "a lessee" or "the lessee" who by section 1 (1) and (2) is empowered to serve a counter-notice. *Egerton* v. *Jones*[5] makes it plain that in forfeiture proceedings a mortgagee by sub-demise need not be served with notice under section 146 of the Act of 1925, yet if such a mortgagee was a "lessee" the decision is incomprehensible.

The right to take advantage of section 1 of the Act of 1938 is therefore confined to those who are entitled to have a notice served on them. The building society has no such right, and its counter-notice is thus ineffective. In any event the defendants, having served no notice of their own, could not take advantage of the building society's notice. The building society is adequately protected by its right to claim relief against forfeiture under section 146 (4) of the Act of 1925, and this right will continue even after judgment for possession against the defendants, until actual entry: *Rogers* v. *Rice*.[6] *Grand Junction Co. Ltd.* v. *Bates*[7] had nothing to do with deciding who was a "lessee" for the purpose of having a notice served upon him under either Act, but was directed to the quite different question of who was an "under-"lessee" for the purpose of claiming relief from forfeiture under section 146 (4) of the Act of 1925.

Reginald Goff Q.C. in reply. The distinction between the use of the words "*a*" and "*the*" in section 1 of the Act of 1938 is important; subsection (3) refers back, not only to subsection (2), which precludes a lessor from bringing an action to recover damages for breach of covenant to repair without serving notice, but also to subsection (1), which refers not to "*the*" lessee, but to "*a*" lessee. "*The*" lessee in subsection (2) means someone who must be served; "*a*" lessee is someone who has in fact been served. In *Egerton* v. *Jones*[8] the relevant word was "*the*" lessee in section 146 (2) of the Law of Property Act, 1925. The ratio decidendi of *Grand Junction Co. Ltd.* v. *Bates*[9] was that a mortgagee was a lessee for the purpose of protecting his security, and that decision applies equally to subsection (1) of section 146.

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[5] [1939] 2 K.B. 702.

[6] [1892] 2 Ch. 170; 8 T.L.R. 511.

[7] [1954] 2 Q.B. 160.

[8] [1939] 2 K.B. 702.

[9] [1954] 2 Q.B. 160.

Lord Goddard C.J. This is a point of law arising on the pleadings set down for trial by an order of Master Lawrence dated June 13 of this year. The action is a forfeiture action, brought for damages for breaches of covenants to repair and to recover possession of certain property in Westminster which was demised on July 18, 1898, by the Ecclesiastical Commissioners to a lessee for a term of 78½ years from Lady Day, 1898. The reversion is now vested in the Church Commissioners, who are the successors in title of the Ecclesiastical Commissioners, and the defendants are the persons who, by divers assignments, are the present tenants in possession of the premises. The defendants, however, mortgaged the premises by way of legal charge on November 29, 1946, to the Hastings and East Sussex Building Society.

In June, 1955, when the Church Commissioners were minded to take proceedings for recovery of possession, the Leasehold Property (Repairs) Act, 1938, was in force. Under that Act it is provided by section 1 (2) that: "A right to damages for a breach "of such a covenant as aforesaid"—that is to say, a covenant to repair—"shall not be enforceable by action commenced at any "time at which three years or more of the term of the lease remain "unexpired unless the lessor has served on the lessee not less "than one month before the commencement of the action such "a notice as is specified in subsection (1) of section 146 of the "Law of Property Act, 1925, and where a notice is served under "this subsection, the lessee may, within twenty-eight days from "the date of the service thereof, serve on the lessor a counter-"notice to the effect that he claims the benefit of this Act." Subsection (3) provides: "Where a counter-notice is served by a "lessee under this section, then, notwithstanding anything in any "enactment or rule of law, no proceedings, by action or other-"wise, shall be taken by the lessor for the enforcement of any "right of re-entry or forfeiture under any proviso or stipulation in "the lease for breach of the covenant or agreement in question, "or for damages for breach thereof, otherwise than with the leave "of the court." The leave of the court has to be obtained before the action is brought.

The practice, I think, is that an originating summons is issued (because, of course, there is no action in existence and a writ cannot be issued) to which the tenant is made a respondent, and the court either gives or refuses leave as the case may be. What happened in the present case was that in June, 1955, the Church Commissioners served a notice under the Act of 1925 upon the defendants, and also, knowing of the mortgage, addressed a notice to and served the Hastings and East Sussex Building Society. The defendants who are now before me are the tenants in possession; they did not serve any counter-notice and, therefore, there was no need, so far as they were concerned, to obtain leave to bring the action. The Hastings and East Sussex Building Society, however, did serve a counter-notice, and have done nothing since—perhaps it was not for them to do anything. Mr. Goff, on behalf of the defendants, has taken the point that, although his clients did not serve any counter-notice (and therefore apparently had no reason or desire to take advantage of such protection as the Leasehold Property (Repairs) Act, 1938, confers upon them) they are entitled to take the point that the building society had issued a counter-notice, and he says, therefore, that the action is wrongly brought against the defendants, although, so far as I know, the building society have never applied, as I dare say they would have been entitled, to be made co-defendants in the action.

I think that when one looks back at section 146 of the Law of Property Act, 1925, it is quite clear that under that section a mortgagee by sub-demise is a " lessee " for the purposes of that section, for by subsection (5) it is provided: " For the purposes of " this section . . . (*b*) ' Lessee ' includes an original or derivative " under-lessee, and the persons deriving title under a lessee." It seems to me that a mortgagee by legal charge must also be included in the term " lessee " for the purposes of section 146 of the Act of 1925, and I am supported in that opinion by the view of Upjohn J. in *Grand Junction Co. Ltd.* v. *Bates*,[1] where he held that for the purposes of obtaining relief against forfeiture there was no distinction to be drawn between a mortgagee by sub-demise and a mortgagee by legal charge. If there is no distinction to be drawn for the purposes of section 146, which requires notice of breaches of covenant to be served on the lessee, there would be no good ground for holding that there was any distinction to be drawn for this purpose in regard to who was a " lessee " under the Leasehold Property (Repairs) Act, 1938.

But that, in my opinion, does not in any way decide the question which arises in this case. Under section 146 of the Act of 1925 there is a necessity to serve *the* lessee. *A* lessee, at any rate, was served here and that was the lessee in possession. There was no obligation on the landlords to serve the mortgagee, nor was there any right in the mortgagee to say that he ought to have been served; that would seem to follow from *Egerton* v.

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[1] [1954] 2 Q.B. 160; [1954] 2 All E.R. 385.

Jones,[2] for, as I have said, I do not see any distinction between who is a lessee for the purpose of being served with a notice under section 146, and who is a lessee for the present purpose. It is clear that the mortgagee could be described as "a lessee," but the action here is brought against the defendants as "the lessee" in the sense of the lessee in possession. The defendants have executed a legal charge of the lease, but they are "the lessee," and as "the lessee" have had the notice served upon them. They have not chosen to take any advantage of the Act of 1938 by serving a counter-notice, and I cannot see, therefore, with all respect to Mr. Goff's argument, why the landlords have not got a right to bring this action. Nor do I see why the defendants, not having served a counter-notice, can take advantage of the fact that the building society, who have no right to receive a notice and on whom there was no obligation to serve a notice, did purport to enter, or did enter, a counter-notice. The building society are not a party to this action and they have not a right to be made a party to the action, except in the sense that they are, as mortgagees, entitled to take advantage of the right, given by subsection (4) of section 146 of the Act of 1925, of coming to the court and asking for an order vesting the lease in them, and the court may then vest the lease in them, subject to such terms as the court may think fit to impose. I think that it would be a very novel ground of interference if I held that, because somebody else, on whom it was not obligatory to serve a notice, had been served with a notice—whether for the purpose of information, courtesy, or by mistake, or for whatever reason—a defendant in the position of these defendants, who could have taken advantage of the Act by serving a counter-notice, was entitled to say: "I am not going to serve a counter-notice: I have no desire to "take advantage of the Act, but I say that somebody who is not "a party to this action and who had no right to receive notice, "did serve a counter-notice."

For these reasons I think that the point of law raised on the pleadings, namely, whether this action can be commenced without the leave of the court, must be decided in favour of the plaintiffs, and I so decide. The plaintiffs will have the costs of this argument.

Judgment for the plaintiffs.

Solicitors: *Warren & Warren; Milles, Day & Co.*

J. F. L.

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[2] [1939] 2 K.B. 702; 55 T.L.R. 1089; [1939] 3 All E.R. 889.

HORNAL *v.* NEUBERGER PRODUCTS LTD.

[Plaint No. O. 663.]

C. A.

1956
Oct. 10, 11;
Nov. 20.

Denning,
Hodson and
Morris L.JJ.

Burden of Proof—Standard of proof—Civil action—Allegation of fraud —Balance of probability.
Fraud.

In a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities.

The plaintiff in an action for damages for breach of warranty or, alternatively, for fraudulent misrepresentation, alleged that the director of the defendant company had in the course of negotiations for the purchase of a used capstan lathe stated that it had been reconditioned by a reputable firm of toolmakers. The defendants denied that the statement had been made. If it had been made, the director must have known it to be untrue.

The county court judge found that the statement had been made, but held on the claim for breach of warranty that it had not been made contractually. On the claim based on fraud he said that he was satisfied on the balance of probability that the statement had been made, and that that was the correct standard to apply; but that he would not have been so satisfied if the criminal standard of proof was to be applied. He gave judgment for the defendants on the ground that the plaintiff had not shown that he had suffered damage by relying on the fraudulent misrepresentation; but he ordered that the plaintiff should pay only one-fourth of the defendants' costs. On appeal by the plaintiff and cross-appeal by the defendants:—

Held, that the judge had applied the correct standard of proof; but that on the facts the plaintiff had suffered damage and was entitled to judgment.

Dicta of Lord Sumner in *Lek* v. *Mathews* (1927) 29 Ll.L.Rep. 141, 164, and of Denning L.J. in *Bater* v. *Bater* [1951] P. 35, 36–37; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458 applied.

Thurtell v. *Beaumont* (1823) 1 Bing. 339 disapproved.

Preston-Jones v. *Preston-Jones* [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124 distinguished.

APPEAL from Judge H. C. Leon, sitting at Willesden County Court.

C. A.
1956

HORNAL
v.
NEUBERGER
PRODUCTS
LTD.

The plaintiff, Jimmie William Frederick Hornal, a precision engineer, wanted a Herbert No. 4 capstan lathe for the purpose of carrying out certain contracts for work. He heard that the defendants, Neuberger Products Ltd., had such a lathe for sale and went to inspect it at their premises, where he saw it in operation and talked to the director and chief shareholder of the defendant company, Mr. Neuberger. At the interview there were present an engineer named Lynch employed by the plaintiff and some of the defendants' employees. They inspected the Herbert No. 4 lathe, discussed it, and after some bargaining about the price, the plaintiff agreed to take it. He signed a purchase order dated October 13, 1954, but the transaction was eventually completed on hire-purchase terms, Neuberger Products Ltd. selling the machine for £415 to United Dominion Trust Ltd., who in turn let it on hire-purchase terms to the plaintiff.

The history of the machine was as follows: The lathe was manufactured by Alfred Herbert Ltd. in January, 1935, for the continental market. It was shipped to Germany in May, 1935. It was used in Germany for many years until in 1951 Mr. Neuberger, on behalf of Neuberger Products Ltd., bought it in Germany from its German owner for about £700. The German owner told him that it had been factory-reconditioned at their works in Germany, and Mr. Neuberger believed him. But nevertheless, when Mr. Neuberger imported the machine into England, in order to obtain it free of duty, he said it had not been reconditioned. He made a declaration that: "We hereby declare these "goods free of duty as British returned goods, which have not "undergone any process of renovation, repair, manufacture, "alteration or addition while abroad." Mr. Neuberger made that declaration regardless of the truth, but, as it suited him to make it, he did so. In 1952 the machine was imported free of duty. The transport arrangements were made by the well-known toolmakers Soag Machine Tools Ltd.: and while it was in their hands they put a metal plate with the name "Soag Machine "Tools" on it. They did it as an advertisement but not meaning to indicate that they had done any work on it. Neuberger Products Ltd. paid some £700 for the machine and took delivery. Mr. Neuberger soon found out that it had not been reconditioned at all. He was very angry about it and managed to persuade the German seller to refund him £300. He then himself did the work necessary to put the machine in good and sound working order. He had a new bar feed put in and the gears put right; but it did not cost him nearly as much as £300.

After the plaintiff had taken delivery of the machine he discovered that a part of it—the turret—was defective; and in order to remedy it he had another turret fitted by the original manufacturers, Alfred Herbert Ltd., at a cost of £50 14s. 3d. That replacement took some seven weeks, during which the plaintiff was unable to use the lathe and suffered damage in consequence.

He thereupon brought an action against the defendants claiming damages for breach of warranty and further or alternatively damages for fraud. In support of that claim he relied on several representations alleged to have been made to him by Mr. Neuberger when he inspected the machine, and in particular alleged that Mr. Neuberger had said to him: "The machine has "been Soag reconditioned"; and he claimed that that was a contractual warranty or, alternatively, a fraudulent misrepresentation. The defendant company, by Mr. Neuberger, denied that he had spoken those words.

The hearing in the county court extended over 12 sittings and included four days of legal submissions. Judge Leon, who had invited the parties at an early stage to reach a settlement, gave judgment on June 6, 1956, in favour of the defendants; but his order as to costs required the plaintiff to pay only one-fourth of the defendants' costs. His findings and the reasons for his decision were as follows:—

He found that in the course of the discussion Mr. Neuberger did in fact say that the machine had been Soag reconditioned, but that he did not say anything else which amounted to a representation or a statement as to the immediate availability of the machine for work. In the judge's view both parties thought that the machine was fit for immediate use, though that had not been expressly stated.

Having said that he thought that the statement as to Soag reconditioning had been made, the judge considered the position in regard to the claim for breach of warranty, and said: "Had I "been satisfied that when Mr. Neuberger made that statement "he intended to be bound by it contractually . . . and that the "plaintiff so understood the statement, I should have had little "difficulty in coming to the conclusion that the statement was "made contractually. . . . But so far from deciding that the "plaintiff has discharged the onus of proof on a preponderance "of probability, I am satisfied that it was nothing of the sort; "this was a discussion between these two gentlemen; . . . and I "have no hesitation in holding that the plaintiff has failed to

C. A.
1956

Hornal
v.
Neuberger
Products
Ltd.

"prove that the defendants gave any warranty to him about the "machine at all, and so I hold."

The judge then turned to consider the plaintiff's claim for fraudulent misrepresentation, based as it was on the same allegations as the claim for breach of warranty. The judge said that though the plaintiff and his witness Lynch were not very satisfactory witnesses, Mr. Neuberger was a man who was quite prepared to tell a lie if he thought that it was to his advantage, for he had told a deliberate lie to the customs authorities when he brought the machine in question from Germany to England. He continued: "I now have to consider whether the plaintiff has "proved his case, and in order to do that I have to come to a "conclusion on the very difficult question as to whether the proof "required of him is no more than what has already satisfied me, "that a certain statement was made, or whether the case has "to be proved beyond all reasonable doubt. If I have to be "satisfied beyond all reasonable doubt I say at once that I should "not be so satisfied in regard to the statement that it was Soag "reconditioned. I have come to the conclusion on the prepon-"derance of probability that that statement was made; but in "my view no jury would dream of convicting a defendant of a "fraud based on that statement, and if I had to consider whether "sitting as magistrates trying a case of false pretences I should "convict Mr. Neuberger, I have no hesitation whatever in saying "that I should not dream of doing so. But this case has not "been proved by criminal standards at all."

The judge then added that Mr. Neuberger had made the statement to persuade the plaintiff to enter into the transaction and that to some extent the plaintiff had relied on the statement. But in order to succeed in an action for fraud it was not enough to show that a contract had been induced by a fraudulent misrepresentation unless some damage were shown by the plaintiff. On the evidence, the judge said, he found that this machine was worth quite as much as, and very likely more than, the plaintiff had paid for it, and accordingly could not see that the plaintiff had suffered any damage as a result of the misrepresentation. For that reason there must be judgment for the defendants.

The judge then considered in detail the question of the measure of proof in civil cases where fraud was alleged, though, as he stated, it would affect only the question of costs. On a review of the authorities the judge accepted that in *Thurtell* v.

C. A.
1956

HORNAL
v.
NEUBERGER
PRODUCTS
LTD.

Beaumont[1]—an insurance case where arson was alleged—the judge had directed the jury that they must be satisfied that the crime imputed to the plaintiff was as fully proved as would justify their finding him guilty on a criminal charge for the same offence; and that that direction was held to be right; but he pointed out that in those days neither a plaintiff nor a defendant could give evidence; and having considered many other cases, including other insurance cases where judges of great authority had stated that the court must be satisfied "beyond all reasonable doubt," the "third party cases" where to establish a claim in a civil action it was necessary to prove a fraud or crime by a third party, the measure of proof in divorce cases, and in particular the judgment of Denning L.J. in *Bater* v. *Bater*,[2] the judge concluded that the standard of proof required in the present case was simply that the judge or jury must be satisfied on the preponderance of probability that the facts necessary to establish the cause of action had been proved, and that the only authority which would compel him to apply the higher standard of proof beyond all reasonable doubt was *Thurtell* v. *Beaumont*[3]; and inasmuch as that had been decided when neither plaintiff nor defendant could give evidence, and, moreover, was inconsistent with many later decisions, he was entitled to follow the later decisions. Accordingly, as he was satisfied on a preponderance of probability that Mr. Neuberger in fact made the statement alleged, that the machine was Soag reconditioned, it would be a representation for which the defendants would be liable if the plaintiff had been able to prove damage. But in default of proving damage, the plaintiff's claim must fail. The judge then made the order as to costs stated above.

The plaintiff appealed on the ground that the judge had misdirected himself in holding that there had been no damage. The defendants cross-appealed on the order as to costs.

Ralph B. Gibson for the plaintiff. First, the judge, in holding that the statement "Soag reconditioned" was not a warranty, erred in that he took into account the plaintiff's subjective state of mind, contrary to the decision in *Couchman* v. *Hill*,[4] followed in *Harling* v. *Eddy*.[5] [*Routledge* v. *McKay*[6] was also referred to.] Secondly, the judge having found that damage was suffered, it was not open to him to hold that no damage in the general sense had been suffered because the plaintiff got a machine worth as much as, if not more than, he had paid for it. Where there has been a fraudulent misrepresentation, it is sufficient for the plaintiff to show that damage flowed from the action taken in reliance on the misrepresentation; it is not necessary to show that damage flowed from the misrepresentation itself. [*Peek* v. *Derry* [7] was referred to.]

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[1] (1823) 1 Bing. 339.

[2] [1951] P. 35, 36–37; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458.

[3] 1 Bing. 339.

[4] [1947] K.B. 554; 63 T.L.R. 81; [1947] 1 All E.R. 103.

[5] [1951] 2 K.B. 739, 741; [1951] 2 T.L.R. 245; [1951] 2 All E.R. 212.

[6] [1954] 1 W.L.R. 615; [1954] 1 All E.R. 855.

[DENNING L.J. In *Peek* v. *Derry* [7] the shares were of no value; but what impressed the judge here is that the plaintiff got his money's worth.]

Only in the capital value of the machine, and not in its use; and because he could not use it immediately he suffered loss. Moreover, it is probable that he paid more for it as "Soag reconditioned" than he would have done if it were not. It does not lie in the mouth of a person who makes a fraudulent statement to say that the other party did not rely on it. The measure of damage to be applied here is that formulated by Slesser L.J. in *London County Freehold and Leasehold Properties Ltd.* v. *Berkeley Property and Investment Co. Ltd.*,[8] namely, the difference between what the plaintiff paid for this machine and what he would have paid but for the fraudulent statement. The measure of damage as formulated by Collins M.R. in *McConnel* v. *Wright* [9] [namely, that in so far as the plaintiff had got an equivalent for the money lost, the loss he could claim as damages was diminished] was not intended to be the general measure of damages applicable in all cases of fraud. *Mullett* v. *Mason* [10] is also relied on.

Samuel Stamler for the defendants. On the claim for breach of warranty the judge did not regard the plaintiff's subjective state of mind as decisive. He correctly applied well-established principles of law in holding that the statement was not made contractually and that the plaintiff knew that it was not so made; that is a finding of fact which should not be disturbed.

Though it is conceded that, if damage is suffered as the result of an intrinsic defect in an article which the plaintiff was induced to buy by reason of a fraudulent misrepresentation, the person who made the misrepresentation is liable in tort for that damage, the defect in the turret holes here was not an intrinsic defect but an obvious defect, and the damage suffered by lost time in getting it put right is too remote; it cannot be said to flow from the misrepresentation or from action taken in reliance on it. The measure of damage adopted in the *London County Freehold and Leasehold* case [11] is wholly inappropriate here; there the subject-matter of sale was a unique property believed to be worth £611,000; here the lathe has an easily ascertainable market value, and the measure of damage is the usual one, the difference between what the plaintiff paid and the market value of the machine on that date. [*Waddell* v. *Blockey* [12] was also relied on.]

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[7] (1887) 37 Ch.D. 541, 565, 577; 4 T.L.R. 84.

[8] [1936] 2 All E.R. 1039, 1047–1048.

[9] [1903] 1 Ch. 546, 553–555.

[10] (1866) L.R. 1 C.P. 559.

On the defendants' cross-appeal the issue for decision is the true standard of proof to be applied in a civil action where fraud is alleged. The burden was on the plaintiff to satisfy the judge that the statement was made, and the judge has said that he was satisfied and at the same time had a reasonable doubt; that is what Bucknill L.J. described in *Bater* v. *Bater* [13] as "an "impossible state of mind."

The authorities show that the higher standard of proof beyond reasonable doubt applicable in criminal cases applies in civil courts only where there is either a specific charge of crime or a specific charge of fraud which for this purpose has been assimilated to crime. The cases fall into four main groups: (1) Cases where there was a specific charge of crime: *Thurtell* v. *Beaumont* [14] and *Herbert* v. *Poland* [15]—two insurance cases where there were allegations of arson against the plaintiff, in both of which the higher standard of proof beyond all reasonable doubt was applied; and two actions for libel where the defence pleaded justification and alleged a crime—*Chalmers* v. *Shackell* [16] and *Willmett* v. *Harmer* [17]—in both of which the jury were directed to decide as on indictment for the offence alleged in the justification. (2) Matrimonial proceedings; and in these the House of Lords has now laid down, in *Preston-Jones* v. *Preston-Jones*,[18] that the word "satisfied" in the Matrimonial Causes Act, 1950, imports proof beyond reasonable doubt; Lord MacDermott [19] said that that standard was required because of the gravity and public importance of the issues involved. (3) The "third party" cases, namely, those where an allegation of crime is made not against a party

[11] [1936] 2 All E.R. 1039.

[12] (1879) 4 Q.B.D. 678.

[13] [1951] P. 35, 36; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458.

[14] (1823) 1 Bing. 339.

[15] (1932) 44 Ll.L.Rep. 139.

[16] (1834) 6 C. & P. 475.

[17] (1839) 8 C. & P. 695.

[18] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

[19] [1951] A.C. 391, 417.

to the proceedings but against some third party: *Vaughton* v. *London and North Western Railway Co.*,[20] *Boyce* v. *Chapman and Brown*[21] and *Hurst* v. *Evans*.[22] In those cases the lower civil standard was applied. That is plainly inconsistent with the decisions in group (1) (supra); for though in *Vaughton's* case[23] and in *Boyce* v. *Chapman and Brown*[24] the justification for applying the civil standard of balance of probability might be that there was only a general allegation of crime against persons unnamed, in *Hurst* v. *Evans*[25] the third party against whom a specific crime was alleged was a named person.

[MORRIS L.J. Surely in the third party cases the standard ought to be higher, for the person against whom the crime is alleged is not there to defend himself. If the proceedings are reported he may be condemned in the eyes of the world.]

[HODSON L.J. That applies in all cases. One cannot get a logical result from a consideration of these authorities. The first group must have been wrongly decided.]

It is clear that, though there is no moral justification for it, the courts have drawn a distinction in cases where the fraud or crime alleged is that of a third party, and have not required the higher standard to be applied. (4) The residuary group of cases, in which a charge of fraud or fraudulent statement has been made in the course of civil proceedings. Although the pronouncements relied on in these cases are admittedly only dicta, it is submitted that one of them—*Elfie A. Issaias* v. *Marine Insurance Co. Ltd.*[26] —is binding on this court, for the submissions of eminent leading counsel—Lord Halsbury K.C. and Mr. R. A. Wright K.C. (later Lord Wright)—show that the specific point as to the standard of proof was raised, and the Court of Appeal, discharging the plaintiff from the finding of " guilty " by Bailhache J., adopted the higher standard of proof beyond all reasonable doubt. In that case it was alleged that a shipowner in an insurance claim had connived in the scuttling of his ship.

[DENNING L.J. A case of scuttling is like the cases alleging arson; the charge ought to be proved beyond reasonable doubt because it is so grave.]

Scuttling a ship is not a crime unless it is one of Her Majesty's ships or there is an attempt to defraud underwriters. Though it is conceded that in *Lek* v. *Mathews*[27] Lord Sumner's speech[28] appears to support the adoption of the lower standard of balance of probability and is to that extent inconsistent with the *Issaias* case,[29] the point as to standard of proof does not appear to have been argued in *Lek* v. *Mathews*,[30] and the dictum of one of their Lordships in the House of Lords cannot overrule the decision of all the members of the Court of Appeal after argument on that specific point in the *Issaias* case.[31] [*Demetriades & Co.* v. *Northern Assurance Co.*[32] was also referred to.] Devlin J. in *Armstrong* v. *Strain*[33] also appeared to indicate that where fraud is alleged the higher standard applies. The court is not asked to lay down broad general principles covering standards of proof in every possible type of civil action, but only to say that on the authorities as they stand proof beyond a reasonable doubt, whether qualified by considering it a criminal standard or not, is required where a charge is made either of a specific crime or of fraud.

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[20] (1874) L.R. 9 Ex. 93.

[21] (1835) 2 Bing.N.C. 222.

[22] [1917] 1 K.B. 352; 33 T.L.R. 96.

[23] L.R. 9 Ex. 93.

[24] 2 Bing.N.C. 222.

[25] [1917] 1 K.B. 352.

[26] (1922) 13 Ll.L.Rep. 381; (1923) 14 Ll.L.Rep. 1, 395, 464 et seq.; (1923) 15 Ll.L.Rep. 186 (C.A.).

[DENNING L.J. If that is correct, and a statement is made which is both a warranty and a fraud, the court would be driven to saying that the warranty was to be decided on the lower and the fraud on the higher standard. That would be bringing the law into contempt.]

If the plea is both in warranty and fraud the higher standard must be applied. [*Cooper* v. *Slade*[34] was cited for the earliest use, *per* Willes J., of the words "preponderance of probability"; and *Miller* v. *Minister of Pensions*, *per* Denning L.J.,[35] that "proof beyond reasonable doubt" did not mean "beyond a "shadow of doubt."]

Gibson in reply. Though the *Issaias* case[36] is claimed as a clear decision of an appellate court on the proper standard of proof when considered as an abstract code of law, *Lek* v. *Mathews*[37] is equally authoritative. The so-called authorities are not so cogent as they would be if this particular point had been argued. The correct statement of the law is that of Denning L.J. in *Bater* v. *Bater*,[38] namely, that the degrees of probability must be commensurate with the subject-matter. *Thurtell* v. *Beaumont*[39] is

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[27] (1927) 29 Ll.L.Rep. 141.

[28] Ibid. 164.

[29] 15 Ll.L.Rep. 186.

[30] 29 Ll.L.Rep. 141.

[31] 15 Ll.L.Rep. 186.

[32] (1923) 17 Ll.L.Rep. 327 (H.L.).

[33] [1951] 1 T.L.R. 856, 861 (K.B.); [1952] 1 K.B. 232; [1952] 1 T.L.R. 82; [1952] 1 All E.R. 139 (C.A.).

[34] (1858) 6 H.L.C. 746, 772.

[35] [1947] W.N. 241; 63 T.L.R. 474; [1947] 2 All E.R. 372.

[36] 15 Ll.L.Rep. 186.

[37] 29 Ll.L.Rep. 141.

[38] [1951] P. 35, 36–37.

[39] 1 Bing. 339.

C. A.
1956

HORNAL
v.
NEUBERGER
PRODUCTS
LTD.

not a continuing authority, and that which the county court judge in the present case said about the position of the parties at that date is adopted here. *Herbert* v. *Poland*[40] was wrongly decided and is inconsistent with *Hurst* v. *Evans*.[41]

[DENNING L.J. Unless the point is particularly argued most people would say that where there is a serious allegation such as arson there must be a very high degree of proof: see *per* Lord Goddard C.J. in *Regina* v. *Hepworth and Fearnley*[42] on the difficulty of understanding how there can be two standards.]

The county court judge did not misdirect himself on the standard of proof; he said that he must be satisfied on balance of probability having regard to the nature of the allegation, and that in a civil action one does not require that particular degree of certainty required by the criminal law, because in a civil action the court is not handing out retribution but balancing the rights of the parties. It is not possible to find one principle covering all the cases; but where the criminal test has been applied it indicates the attitude of the court in approaching such problems as arose in the insurance and in the libel cases. The judge's finding that the statement was made should not be disturbed.

Cur. adv. vult.

Nov. 20. DENNING L.J. The question in this case is whether Mr. Neuberger orally represented to the plaintiff that a certain capstan lathe had been "Soag reconditioned." I should have thought it was a simple question of fact for the judge to decide on the evidence, but it has become so mixed up with questions of law that the case took many days in the court below and over two days before us. To make the position clear I must give the history of the machine. [His Lordship stated the facts as set out above, and continued:] The judge seems to have found it difficult to make up his mind whether Mr. Neuberger made that representation [that it was Soag reconditioned] or not. The judge said that his decision depended on the standard of proof which was to apply. If he was to apply the standard in civil cases—the balance of probability—he would hold that the representation was made by Mr. Neuberger: but if he was to apply the standard in criminal cases—proof beyond reasonable doubt—he would hold that the representation was not made.

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[40] 44 Ll.L.Rep. 139.

[41] [1917] 1 K.B. 352.

[42] [1955] 2 Q.B. 600, 603; [1955] 2 All E.R. 918.

Such being the judge's state of mind, he considered first whether there was a contractual warranty. On that issue the civil standard of proof clearly applied. He found on the balance of probabilities that Mr. Neuberger did say that the machine had been Soag reconditioned, that Mr. Neuberger made it in order to persuade Mr. Hornal to enter into the transaction, and that Mr. Hornal relied upon it: but he found that it was not a contractual warranty because it was not so intended. I do not think we can disturb that finding. The judge clearly had in mind the speech of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1] and directed himself by it. It was said that the judge made a mistake in that he tried to look into the minds of the parties to see if in their inmost thoughts they intended a warranty: whereas he ought only to have looked at their external behaviour to see whether it bore the reasonable inference of a warranty. Now I quite agree that if the judge did try to look into their inmost thoughts it would be a mistake. In seeing whether there is a contract or not, the law can only look to outward appearances. If an intelligent bystander would reasonably infer that a warranty was intended that will suffice, even though neither party in fact had it in mind. This is such trite law that I do not think for a moment the judge fell into error about it. It is true that in one passage he used words which seem to suggest that he was looking into the minds of the parties: but in another passage he approached the matter in the correct way. He said that one of the matters that impressed him most was the plaintiff's complete failure to refer in any document to this machine being Soag reconditioned. That is a factor always considered in these cases.

Thus having disposed of the warranty the judge turned to consider whether Mr. Neuberger was guilty of fraud. If Mr. Neuberger did in fact represent that the machine had been Soag reconditioned, he was clearly guilty of fraudulent misrepresentation, because he knew it was not true. He had got £300 from his German supplier because it had not been reconditioned. So the only question was whether Mr. Neuberger made the representation or not. It was there that the judge ran into difficulty—about the standard of proof. He said: "If I have to be satisfied "beyond all reasonable doubt, I should not be so satisfied in "regard to the statement that it was Soag reconditioned. I have "come to the conclusion on the preponderance of probability that "the statement was made, but in my view no jury would dream "of convicting a defendant of a fraud based on that statement,

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[1] [1913] A.C. 30.

"and if I had to consider whether, sitting as a magistrate trying "a case of false pretences, I should convict Mr. Neuberger of "making this statement, I have no hesitation in saying I should "not dream of doing so."

In setting himself this problem the judge showed an uncommon nicety of approach. I must say that, if I was sitting as a judge alone, and I was satisfied that the statement was made, that would be enough for me, whether the claim was put in warranty or on fraud. I think it would bring the law into contempt if a judge were to say that on the issue of warranty he finds the statement was made, and that on the issue of fraud he finds it was not made.

Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law. Take this very case. If Mr. Neuberger did represent that the machine was Soag reconditioned he did very wrong because he knew it was untrue. His moral guilt is just as great whatever the form of the action, no matter whether in warranty or in fraud. He should be judged by the same standard in either case.

I have already expressed my views on this subject in *Bater* v. *Bater*[2] and I need not repeat them here. I would only mention the insurance cases on which Mr. Stamler especially relied, in which the insured person tried to defraud the insurance company by burning down his house or scuttling his ship. In some of those cases, particularly *Thurtell* v. *Beaumont*[3] and *Issaias* v. *Marine Insurance Co. Ltd.*,[4] the judges have said that the offence of arson or malicious damage must be as fully proved as a criminal charge: but the latest case in the House of Lords, *Lek* v. *Mathews*,[5] shows that that is putting too high a burden on the insurance company. Lord Sumner said that[6] "on a civil "issue I do not think more is required than a correct appreciation "of the incidence and the shifting of the onus of proof and a "reasonable estimate of the weight pro and con of the various "parts of the evidence. . . . I am just as reluctant to make the "underwriters pay Mr. Lek many thousands of pounds, if he "has been guilty of making a false claim, as to find him guilty

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[2] [1951] P. 35, 36.
[3] (1823) 1 Bing. 339.
[4] (1923) 15 Ll.L.Rep. 186.
[5] (1927) 29 Ll.L.Rep. 141.
[6] Ibid. 164.

"of it if he has not. The whole question is whether it has been "proved; and I think it has." It is apparent that Lord Sumner considered that proof was only necessary according to the civil standard.

It is unnecessary to discuss here the difference between the criminal standard and the civil standard. I tried to define it in *Miller* v. *Minister of Pensions*.[7] Suffice it to say that the judge, applying the civil standard, found that Mr. Neuberger represented that the machine had been Soag reconditioned, and I do not think that this finding should be disturbed. It can readily be reconciled with his finding that there was no contractual warranty. Suppose that Mr. Neuberger used some such words as these: "It has, I believe, been Soag reconditioned. At least "when I bought it I was told it had been." There would then be no contractual warranty because Mr. Neuberger was only passing on what he had been told, as happened in *Routledge* v. *McKay*[8] and the recent decision of *Oscar Chess Ltd.* v. *Williams*[9]: but there would be a fraudulent misrepresentation because the statement conveyed the false impression that it had been Soag reconditioned, whereas Mr. Neuberger knew it had not.

There remains, however, one more question. Despite his findings that the representation was made the judge dismissed the plaintiff's claim for fraud, because he said he had suffered no damage. He said that the machine was worth quite as much as the £400 the plaintiff paid for it, and very likely more, and that therefore the plaintiff could not recover. I do not agree. The judge had already found that the representation was made in order to persuade the plaintiff to buy the machine, and that the plaintiff did to some extent rely on it. It influenced his mind. I ask myself: how did it influence him? We do not know exactly, but we do know he got the impression that the machine was fit for immediate use. The representation that it had been Soag reconditioned would certainly have helped to produce that impression. He took the machine in the belief that it was fit for immediate use, whereas it was not: and he was put to seven weeks' delay in getting it put right. That is, I think, a head of damage which can properly be said to flow from this fraudulent misrepresentation. The judge put it at some £20 to £30.

Another way of approaching the case is to ask: what would have been the position if the statement had not been made? We

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[7] (1947) 63 T.L.R. 474.

[8] [1954] 1 W.L.R. 615; [1954] 1 All E.R. 855.

[9] Judgments of the Court of Appeal, 1956, No. 302.

C. A.
1956

HORNAL v. NEUBERGER PRODUCTS LTD.

Denning L.J.

do not know. The plaintiff might have offered less, and got the machine for less than it was worth; or he might not have gone on with the transaction at all, but bought another machine elsewhere, and thus saved himself the seven weeks' delay in getting this one put right. In either case he would have suffered damage. I confess that I do not look kindly on a defendant who, having got the plaintiff to buy a machine by knowingly telling him an untruth, afterwards says he suffered no damage. Why say it except to induce him to buy or to pay a higher price than he otherwise would? In either case he suffers damage. The damage may be difficult to assess. It may only be £20 to £30. But that there was some damage sufficient to support the action, I do not doubt.

This means that Mr. Neuberger was guilty of fraud. The appeal should be allowed and judgment entered for damages to be assessed, but I do hope that they can be agreed: and the cross-appeal should be dismissed.

HODSON L.J. The county court judge, having reached the conclusion, on the basis of a balance of probability, that a fraudulent statement had been made, found himself unable to find that fraud had been proved beyond all reasonable doubt. Thus he posed himself the question: "In a civil action are "criminal standards of proof necessary in considering what is "or may be a crime?" This question, after a review of the authorities, he answered in the negative.

The comparative dearth of express authority on this topic is not surprising. No responsible counsel undertakes to prove a serious accusation without admitting that cogent evidence is required, and judges approach serious accusations in the same way without necessarily considering in every case whether or not there is a criminal issue involved. For example, in the ordinary case arising from a collision between two motor-cars involving charges of negligence, I have never heard of a judge applying the criminal standard of proof, on the ground that his judgment might involve the finding of one of the parties guilty of a criminal offence.

The judge took great pains to consider the cases in which the question he posed had been considered. I do not propose to follow him in their review, agreeing as I do with his conclusion. I agree with him that in most civil cases, where the standard of proof in cases involving crime has been mentioned, there has been no argument, and the heavier burden of proof has been accepted by counsel or assumed as necessary by the judge. I also think that it is impossible to find a satisfactory explanation of all cases where divergent views have been taken. For example, it seems to have been taken for granted in what may be called the third party cases that the crime of a person not concerned in the action may be established on a balance of probabilities: see, for example, *Boyce* v. *Chapman and Brown*[10] and *Vaughton* v. *London and North Western Railway Co.*[11] If the criminal standard were required in civil cases for the reason suggested in Taylor on Evidence (12th ed., vol. 1, at p. 106), namely, that every man has a right to his character and not to have the presumption of innocence rebutted unless the strict standard were adopted, the third party cases would appear to be cases where the rule ought to be most strictly applied, since the third party may not even know of the charge which is being made against him in an action between two persons in whose dispute he is not interested, and even if he knows of it may have no opportunity of intervening in it.

Notwithstanding the existence of some cases where the point appears to have been argued and decided in a contrary sense, I think the true view, and that most strongly supported by authority, is that which the judge took, namely, that in a civil case the balance of probability standard is correct. I propose to refer only to a few of the authorities.

The first is *Cooper* v. *Slade*.[12] The action was for penalties for bribery under the Corrupt Practices Prevention Act, 1854, which declared the giving or promising of bribes to voters to be a misdemeanor. Willes J., one of the judges who was summoned to give his opinion to the House, in the course of his speech said[13]: "As a difference of opinion exists upon this question, I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. Best's very able and instructive treatise on the Principles of Evidence (2nd ed., p. 114). So long since as the 14th Eliz., Dyer C.J. and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence, 'that in a writ or declaration or other pleading certainty ought to be shown, for there the party must answer to it, and the court must adjudge upon it; and that which the party shall be

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[10] (1835) 2 Bing.N.C. 222.

[11] (1874) L.R. 9 Ex. 93.

[12] (1858) 6 H.L.C. 746.

[13] Ibid. 772.

"'compelled to answer to, and which is the foundation whereupon "'the court is to give judgment, ought to be certain, or else the "'party would be driven to answer to what he does not know, "'and the court to give judgment upon that which is utterly "'uncertain. But where the matter is gone so far that the "'parties are at issue, or that the inquest is awarded by default, "'so that the jury is to give a verdict one way or the other, "'there, if the matter is doubtful, they may found their verdict "'upon that which appears the most probable, and by the same "'reason that which is most probable shall be good evidence.'"

In more recent times there is the speech of Lord Sumner in *Lek* v. *Mathews*,[14] where he said: "With great respect to the "Lords Justices it seems to me that what has really made both "this forgery theory and this construction of the claim attractive "has been a strong reluctance to say that Mr. Lek has tried to "cheat and has backed his effort by perjury. This has been "supported by a canon, new to me in the form employed, to the "effect that such a man as Mr. Lek cannot be convicted of this "so long as any reasonable possibility remains of explaining his "conduct otherwise. I am afraid I look at it differently and "think that this is wholly without authority. When prisoners "could not give evidence, such an appeal might have passed "muster with a jury, but on a civil issue I do not think more is "required than a correct appreciation of the incidence and the "shifting of the onus of proof and a reasonable estimate of the "weight pro and con of the various parts of the evidence. Mr. "Lek's wealth and reputation are material only as ground for "considering the probability of such misconduct. The consequences of a verdict against him are quite immaterial. I am "just as reluctant to make the underwriters pay Mr. Lek many "thousands of pounds, if he has been guilty of making a false "claim, as to find him guilty of it if he has not. The whole "question is whether it has been proved; and I think it has." There is in truth no great gulf fixed between balance of probability and proof beyond reasonable doubt. Although when there is a criminal prosecution the latter standard is securely fixed in our law, yet the measure of probability is still involved in the question of proof beyond reasonable doubt.

Students are familiar with Professor Kenny's Outlines of Criminal Law (16th ed. (1952)), where the following passage appears at p. 416: "A larger minimum of proof is necessary to

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[14] 29 Ll.L.Rep. 141, 164.

"support an accusation of crime than will suffice when the charge "is only of a civil nature. For in the latter it is sufficient that "there be a *preponderance* of evidence in favour of the successful "party, whereas in criminal cases the burden rests upon the "prosecution to prove that the accused is guilty 'beyond reason-"'able doubt.' When therefore the case for the prosecution is "closed after sufficient evidence has been adduced to necessitate "an answer from the defence, the defence need do no more than "show that there is *a reasonable doubt* as to the guilt of the "accused. See *Rex* v. *Stoddart.*[15] Even in civil proceedings, "e.g. in actions of debt, a mere scintilla of evidence would not "warrant the jury in finding a verdict for the plaintiff; for there "must (as we have seen) be so much evidence that a reasonable "man might accept it as establishing the issue. But in criminal "cases the presumption of innocence is still stronger, and accord-"ingly a still higher minimum of evidence is required; and the "more heinous the crime the higher will be this minimum of "necessary proof. The progressive increase in the difficulty of "proof, as the gravity of the accusation to be proved increases, "is vividly illustrated in an extract from Lord Brougham's "speech in defence of Queen Caroline[16]: 'The evidence before "'us,' he said, 'is inadequate even to prove a debt—impotent "'to deprive of a civil right—ridiculous for convicting of the "'pettiest offence—scandalous if brought forward to support a "'charge of any grave character—monstrous if to ruin the "'honour of an English Queen.'" This passage appears in the earlier editions of this work for which the late Professor Kenny was responsible.

Denning L.J. referred both to criminal and civil cases when he expressed the same idea in *Bater* v. *Bater*[17]: "The difference "of opinion which has been evoked about the standard of proof "in recent cases may well turn out to be more a matter of words "than anything else. It is of course true that by our law a "higher standard of proof is required in criminal cases than in "civil cases. But this is subject to the qualification that there "is no absolute standard in either case. In criminal cases the "charge must be proved beyond reasonable doubt, but there may "be degrees of proof within that standard. As Best C.J., and "many other great judges have said, 'in proportion as the crime "'is enormous, so ought the proof to be clear.' So also in civil

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[15] (1909) 25 T.L.R. 612; 2 Cr.App. R. 217, 242.

[16] Cited inaccurately from Lord Brougham's Speeches, vol. 1, 227, *q.v.*

[17] [1951] P. 35, 36, 37.

"cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that "standard. The degree depends on the subject-matter. A civil "court, when considering a charge of fraud, will naturally "require for itself a higher degree of probability than that which "it would require when asking if negligence is established. It "does not adopt so high a degree as a criminal court, even when "it is considering a charge of a criminal nature; but still it does "require a degree of probability which is commensurate with the "occasion."

This citation comes from a judgment given on appeal in a divorce case. The House of Lords has now held in *Preston-Jones* v. *Preston-Jones* [18] that the words of the Divorce Act [the Matrimonial Causes Act, 1950] produce the same result as the rule in criminal cases although divorce cases are civil actions. Nevertheless, on the general question of the standard of proof in criminal and civil cases, I would like to express my complete concurrence with the words used by Denning L.J. in the passage I have cited. Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.

On the other questions of law and fact raised on this appeal and on the issue as to damage, I agree with the judgment of Denning L.J., and also with the judgment which Morris L.J. is about to deliver, which I have had the advantage of reading.

The appeal should be allowed to the extent stated, and the cross-appeal dismissed. I agree with the form of order proposed.

MORRIS L.J. After a very full hearing which extended over many days, the judge delivered a judgment in the course of which he examined and analysed all the evidence. The plaintiff had become aware that the defendants possessed a Herbert No. 4 capstan lathe. The plaintiff, accompanied by his engineer, went to see it, and had an interview with Mr. Neuberger at which others were present. There was a discussion about the machine. There was bargaining about its price. The plaintiff was shown the gears. The power was turned on. The plaintiff thought that the machine was fit for immediate use and that it would avail him for some work of his that he had in mind. The plaintiff as a result acquired the machine. The acquisition was not effected by direct purchase but by the assisting introduction of a hire-purchase company. The plaintiff affirmed and Mr. Neuberger denied that in the course of the discussion Mr. Neuberger had said that the machine had been "Soag reconditioned." The significance of the phrase in question was well understood by those concerned. It was first of all a question of fact whether Mr. Neuberger had made the alleged statement. The judge held that he had. On that finding the question arose whether what Mr. Neuberger had said had contractual effect. Being an affirmation made during negotiations for a sale, it would not have been surprising if it had been held that the statement had contractual quality. But the judge made a correct approach in law when he considered the totality of the evidence so as to decide whether contractual intention existed. There was much oral evidence to be considered: there was correspondence which, either by reason of what it contained or by reason of what it did not contain, had some evidential value. The judge had no hesitation in holding that the statement of Mr. Neuberger was not contractual. He held that neither the plaintiff nor Mr. Neuberger had thought it to be. "It was simply a matter of "talking about the machine." Although wrong statements made when someone is about to buy ought not readily to be held to be beyond the frontiers of contract, it seems to me that the judge approached the issue with discrimination. He appears to have applied the correct tests, and, accordingly, I do not think that his conclusion should be displaced.

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[18] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

It is not in dispute that if Mr. Neuberger made a representation that the machine was Soag reconditioned he knew that the representation was false. Accordingly, if the representation was made, then, although there was no warranty, there was an actionable misrepresentation. But here a question arises as to whether the judge misdirected himself when deciding the issue as to whether the two words "Soag reconditioned" were or were not spoken. He has said that if as to this he ought to be satisfied in the way in which a court or a jury would have to be satisfied before convicting in a criminal case, then in this case he was not so satisfied, but he was satisfied if he was entitled to decide the matter as issues in civil actions are decided, that is, according to the balance of probabilities. The precision of this revealed judicial heart-searching is impeccable from the point of view of its logical nicety. The question of fact which the judge had to decide was simply whether Mr. Neuberger spoke the two words in question. If he did, the words might have been a warranty or they might have been a representation, which in this case would be actionable because fraudulent. It would be strange if different standards of proof as to the speaking of the two words could be applicable according as to what civil legal rights followed.

In a criminal case a jury must be directed that the onus is all the time upon the prosecution and that before they convict they must feel sure of the accused's guilt. Authoritative guidance in regard to directing juries in criminal cases is to be found in the judgment of Lord Goddard C.J. in *Regina* v. *Hepworth and Fearnley*,[19] and in other cases. It has, however, been emphasized that what is vital is not the mere using of some particular formula of words but the effect of a summing-up in giving true guidance as to the right approach.

It is, I think, clear from the authorities that a difference of approach in civil cases has been recognized. Many judicial utterances show this. The phrase " balance of probabilities " is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. But perhaps they illustrate that " the life " of the law is not logic but experience." In some criminal cases liberty may be involved; in some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. Good name in man or woman is " the immediate jewel of their souls."

But in truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by Denning L.J. when in his judgment in *Bater* v. *Bater*[20] he spoke of a " degree of probability which is commensurate with the " occasion " and of " a degree of probability which is proportionate to the subject-matter."

In English law the citizen is regarded as being a free man of good repute. Issues may be raised in a civil action which affect character and reputation, and these will not be forgotten by judges and juries when considering the probabilities in regard to whatever misconduct is alleged. There will be reluctance to rob any man of his good name: there will also be reluctance to make any man pay what is not due or to make any man liable who is not or not liable who is. A court will not be deterred from a conclusion because of regret at its consequences: a court must arrive at such conclusion as is directed by the weight and preponderance of the evidence.

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[19] [1955] 2 Q.B. 600; [1955] 2 All E.R. 918.

[20] [1951] P. 35, 36, 37.

In my judgment, the judge did not misdirect himself in approaching the case on the basis of the preponderance of probability in deciding that Mr. Neuberger had stated that the machine was Soag reconditioned. It follows that there is liability if damage resulted and if damage was proved. I consider that there was resulting damage as indicated by my Lord, and I agree with the course proposed.

Appeal allowed. Judgment entered for the plaintiff with agreed damages of £40.
Cross-appeal dismissed.

Solicitors: *Goodman, Monroe & Co.; C. Butcher & Simon Burns.*

M. M. H.

ST. JOHN SHIPPING CORPORATION v. JOSEPH RANK LTD.

1956
Oct. 11, 12, 29.
Devlin J.

[1956 S. No. 24.]

Shipping—Load line—Overloading—Contravention of statute—Effect on contract of carriage—Whether shipowner entitled to recover freight —Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *ss.* 44, 57.
Contract—Illegality—Contract prohibited by statute.

By section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, a British load line ship "shall not be so "loaded as to submerge . . . the load line indicating or purporting "to indicate the maximum depth to which the ship is for the "time being entitled under the load line rules to be loaded." By section 57 the provisions of section 44 apply to load line ships "not registered in the United Kingdom while they are within any "port in the United Kingdom . . ."

1956

St. John Shipping Corporation v. Joseph Rank Ltd.

A ship, registered in Panama, carrying grain from a United States port to a port in the United Kingdom under a charterparty made between the shipowners and English charterers put in to a port in Florida and took on bunkers, overloading the ship and causing its load line to be submerged. The load line was still submerged when the ship arrived at its destination and the master was prosecuted for an offence under sections 44 and 57 of the Act of 1932,[1] convicted and fined £1,200. The defendants, holders of a bill of lading in respect of part of the cargo, paid most of the freight due, but they (together with another cargo-owner) withheld a sum equivalent to the freight on overall additional cargo carried by the ship by which it was found to be overloaded. They contended, when sued for the balance of the freight, that the shipowners were not entitled to recover any part of it as they had performed the charter in an illegal manner:—

Held, (1) that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit, and that, on a true construction of the Act of 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiffs' infringement of sections 44 and 57 did not prevent them from suing on the contract.

Dicta of Parke B. in *Cope* v. *Rowlands* (1836) 2 M. & W. 149, 157, of Tenterden C.J. in *Wetherell* v. *Jones* (1832) 3 B. & Ad. 221, 225 and of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513 applied.

Anderson Ltd. v. *Daniel* [1924] 1 K.B. 138; 40 T.L.R. 61 explained.

(2) That in order to succeed in their claim for freight the plaintiffs need do no more than show that they had delivered the goods to the defendants in the same good order and condition in which they had received them, and it was not necessary for them to disclose that they had committed an illegality in the course of the voyage.

(3) That the principle that a right was unenforceable if it directly resulted from the crime of the person asserting it did not apply in the present case, for the plaintiffs' right to freight from the defendants was not a right which was brought into existence by their crime, which affected the total amount of freight earned by the ship, and no claim or part of a claim for freight could be clearly identified as being for the excess illegally earned; accordingly the plaintiffs' claim succeeded.

Beresford v. *Royal Insurance Co. Ltd.* [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602 distinguished.

ACTION.

The plaintiffs, St. John Shipping Corporation, were a body incorporated under the laws of Panama and owners of the vessel *St. John*, registered in Panama and a "load line vessel not

1956

ST. JOHN SHIPPING CORPORATION v. JOSEPH RANK LTD.

"registered in the United Kingdom" within the meaning of section 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932.[1] The vessel's summer load line corresponded to a mean draft of 27 ft. $8\frac{7}{8}$ ins. and her winter load line to a mean draft of 27 ft. $1\frac{7}{8}$ ins. The vessel was chartered by a charterparty dated London, October 18, 1955, by the plaintiffs to Gilbert J. McCaul & Co. Ltd., English charterers, to load 9,700 tons of 2240 lbs. of heavy grain at one safe port, U.S. Gulf, for carriage to London, Avonmouth or Birkenhead, one port only, and deliver the same always afloat agreeable to bills of lading, on being paid freight in cash in British sterling at discharging port.

The defendants, Joseph Rank Ltd., were holders of a bill of lading in respect of 28 parcels of wheat on which the freight due was £18,893 4s. 0d. They paid £16,893 4s. 0d. but withheld the balance of £2,000. The plaintiffs sued for the balance.

The following statement of facts was agreed between the parties.

The goods on which the plaintiffs claimed the balance of freight were loaded on the vessel at Mobile, Alabama, in November, 1955, and were carried by the vessel to Birkenhead pursuant to a bill of lading dated November 2, 1955, whereof the defendants were indorsees to whom the property in the goods passed upon or by reason of such indorsement. The vessel completed loading and sailed from Mobile at 9.30 a.m. on November 2, 1955. On completion of loading the vessel's mean draft, according to a certificate of inspection issued by National Cargo Bureau Inc., dated November 2, 1955, was 27 ft. $8\frac{1}{2}$ ins.

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[1] Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44: "(1) A British load line ship "registered in the United Kingdom shall not be so loaded as to "submerge in salt water, when the "ship has no list, the appropriate "load line on each side of the ship, "that is to say, the load line indicating or purporting to indicate the "maximum depth to which the ship "is for the time being entitled under "the load line rules to be loaded. "(2) If any such ship is loaded in "contravention of this section, the "owner or master of the ship shall for "each offence be liable to a fine not "exceeding one hundred pounds and "to such additional fine, not exceeding the amount hereinafter specified, "as the court thinks fit to impose "having regard to the extent to "which the earning capacity of the "ship was, or would have been, "increased by reason of the submersion. (3) The said additional "fine shall not exceed one hundred "pounds for every inch or fraction of "an inch by which the appropriate "load line on each side of the ship "was submerged, or would have "been submerged if the ship had "been in salt water and had no list."

S. 57: "The provisions of section "44 of this Act shall apply to load "line ships not registered in the "United Kingdom, while they are "within any port in the United "Kingdom, as they apply to British "load line ships registered in the "United Kingdom . . . :"

The vessel then called at Port Everglades, Florida, for bunkers. She arrived at Port Everglades at 5.30 p.m. on November 5, and sailed at 1.30 a.m. on November 6, having taken on board 600 tons of bunkers. By virtue of the bunkers so taken on board the vessel's mean draft on her departure from Port Everglades was increased to about 28 ft. 7 ins. thereby causing the vessel's summer load line to become submerged by about 10 inches. On November 8 the vessel crossed latitude 36° north and thereby passed into the winter zone, having at all times previously been in the summer zone. The vessel was thereafter throughout in the winter zone and on November 22 she reached the River Mersey. Upon entering the winter zone the vessel's winter load line was submerged by about 16 inches. In the course of the vessel's passage up the River Mersey the master caused the vessel's forepeak tank to be filled for the purpose of trimming the vessel. The capacity of the tank was about 140 tons and the effect of filling the same was to increase the vessel's arrival draft by about 2 ft. 8 ins. On arrival at Birkenhead the vessel's mean draft was about 28 ft. 1 in. and the vessel was accordingly laden below her winter marks by about 11 inches.

Proceedings were thereafter instituted against the master in a court of summary jurisdiction held at Wallasey wherein the master was charged with an offence under sections 44 and 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, in respect of the vessel being overloaded at Birkenhead, and on November 28, 1955, the master was fined the sum of £1,200. Evidence was tendered in the proceedings that the vessel's deadweight scale was out of date. The vessel loaded in fresh water at Mobile and it was accordingly necessary to load by reference to the vessel's deadweight scale.

In the present action the plaintiffs claimed the amount of freight withheld by the defendants on their parcel. Another receiver also withheld freight to the amount of £295 8s. 10d. The total thus withheld was withheld in consultation with and at the request of the charterers and was the equivalent to freight on about 427 tons of cargo, which tonnage was equivalent to the overall additional cargo on board the vessel by reason whereof the vessel was found to be loaded below her winter marks on arrival at Birkenhead.

The Governments of the United States of America and of Panama ratified or acceded to the International Load Line Convention, 1930, in the years 1932 and 1936 respectively, and the United States of America and Panama are " countries to which "the Load Line Convention applies" within the meaning of the Act of 1932 by virtue of declarations made by Order in Council pursuant to section 65 of the Act.

It was agreed that (a) in event of the parties agreeing the text of any material legislation of the U.S.A. and/or Panama the court should be free to construe the same and expert evidence as to the effect of such foreign law should be dispensed with; (b) in the event of the parties not having agreed the text of any such material legislation either party should be at liberty to adduce evidence at the trial with regard to the same.

By their defence the defendants alleged that the plaintiffs had performed the charter in an illegal manner, by so loading the ship as to submerge or allow to be submerged her load line by about 11 inches while in part of the United Kingdom, namely, Birkenhead, contrary to the provisions of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. They accordingly claimed that the plaintiffs were not entitled to the sum claimed or any part thereof.

The plaintiffs, in reply, contended that the matters relied on by the defendants afforded no ground of defence in point of law to the claim made against them.

Ashton Roskill Q.C. and *Basil Eckersley* for the plaintiffs. The defendants agree that the onus is on them. They should therefore begin.

John Wilmers for the defendants. The plaintiffs admit that this ship was a "load line vessel not registered in the United "Kingdom" within the meaning of section 57 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. Therefore section 44 applies subject to certain modifications which are not material and the ship must not be so loaded as to submerge her load line. Section 44 (2) provides a penalty for overloading. It is clear from the preamble to the Act that its purpose is to promote safety of life and property at sea. It is therefore an Act designed for the protection of the public and the prohibition against overloading and the penalty therefor is not a mere revenue matter. The plaintiffs' claim is in respect of a contract of carriage by their ship. To succeed, they must show that they have carried by their ship. In so doing they must show, as is the case, that they have carried the goods in an illegal manner, that is to say, in a way prohibited by the Act. It is a principle of English law that if the way in which the contract is performed is illegal, that is a defence to an action upon the contract.

[Devlin J. That is a very wide proposition. It means that if goods are carried by land and the consignee proves that at some stage the carrier exceeded the 30 miles per hour speed limit he will be unable to recover his freight.]

That is so if the carrier himself carries the goods. It might be different if the goods were carried by a servant, because in such a case there would be no intention on the part of the carrier himself to do anything illegal, and the illegality must be directly connected with the contract. Here an act was done wrongly by the shipowners. It must be right to impute knowledge of the wrong to them although the doctrine which is contended for does not depend upon knowledge. The width of the doctrine does not affect the matter at all. Reliance is placed on *Anderson Ltd.* v. *Daniel*[2] and the principle stated therein by Atkin L.J.[3] that a contract is unenforceable by the offending party where illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed between the parties was capable of being performed in a legal manner. The present case is indistinguishable from that case.

[Devlin J. The principle seems to be that if the law requires a contract to be performed in a particular way and it is performed in a different way, which is illegal, the contract is not enforceable. The contract under consideration here is that the goods shall be carried safely and the Act says in effect that for that purpose the ship must not be loaded beyond a certain point. Previous cases all appear either to have affected the goods themselves or the way in which they have been supplied. Here the goods are not affected.]

A contract for the carriage of goods is basically a contract for services to be rendered. In such a contract those services must be rendered lawfully. If the carriage is performed in a way that is unlawful, as in the present case, then the services are unlawful. Admittedly this involves that if any ship is overloaded by a fraction of an inch no one need pay any freight at all, subject to the de minimis rule.

[Devlin J. That rule cannot apply to a case of illegality. In *Vita Food Products Inc.* v. *Unus Shipping Co.*[4] Lord Wright[5] seems to distinguish between doing an act knowingly and doing it unknowingly.]

[2] [1924] 1 K.B. 138; 40 T.L.R. 61.

[3] [1924] 1 K.B. 138, 149.

[4] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

[5] [1939] A.C. 277, 301.

If that be right, then clearly this is a case where the illegality was committed knowingly. *B. & B. Viennese Fashions* v. *Losane*[6] is an application of *Anderson Ltd.* v. *Daniel*,[7] which is applicable to the present case and is indistinguishable. In *Marles* v. *Philip Trant & Sons*[8] Denning L.J.[9] purports slightly to qualify *Anderson's* case,[10] but the qualification does not affect the point because whether the contract is illegal or unenforceable by the person who has performed it in an illegal way the position is the same. [Reference was also made to *Bensley* v. *Bignold*.[11]]

[Devlin J. There are passages in some cases which say that the taint of illegality turns a legal contract into an illegal one. But a shipowner suing for his freight has only to show that he delivered the goods in the same condition that he received them. If the contract remains alive he can recover his money so long as he has not to lay the illegality before the court. Your proposition would mean that any incidental breach of contract of carriage would prevent him from recovering the contract price at all. Is there any authority for the proposition that carrying the goods safely is a condition precedent to recovery of the freight?]

This field appears to be quite free from authority. It is submitted that quite clearly the carrier cannot sue for the price except by setting up the contract. If he is to recover the full amount he must show that he has fully performed his contract and therefore must show that he has kept the goods properly.

[Devlin J. That means that every term of the contract is a condition precedent and obliterates the distinction in law between terms which are conditions precedent and those which are warranties.]

In a contract of carriage the manner of carriage is so fundamental as to be a condition precedent. This comes back to cases like *Alexander* v. *Railway Executive*,[12] which was a contract of bailment. In *Forster* v. *Taylor*[13] the judge seemed to think it was important to decide whether the Act (36 Geo. 3, c. 88) was for the protection of the buyer or the seller. It is submitted that that is not relevant, but if it is, then the Act of 1932 was passed for the protection of the owners of goods shipped. [Reference was also made to *Cundell* v. *Dawson*.[14]] Here the entire performance of the contract was illegal and intentionally so. At the outset the ship was subject to United States law and subject to the United States Load Line Act. It is clear that the plaintiffs were in breach of American law when the ship left the United States. During the voyage the law of her flag was Panama. On the high seas she was in breach of Panamanian law.

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[6] [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909.

[7] [1924] 1 K.B. 138.

[8] [1954] 1 Q.B. 29; [1953] 1 All E.R. 651.

[9] [1954] 1 Q.B. 29, 37.

[10] [1924] 1 K.B. 138.

[11] (1822) 5 B. & Ald. 335.

[12] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.

[13] (1834) 5 B. & Ad. 887.

[14] (1847) 4 C.B. 376.

Ashton Roskill Q.C. and *Basil Eckersley* for the plaintiffs. On the facts it is difficult to see any merits in the defence and the only question is whether it is sustainable in law. It is submitted that the defence is misconceived. The Act of 1932 is not directed in any way to the performance of any contract. The present case is therefore distinguishable from those where illegal performance has been held to defeat a right of action upon a contract. As a matter of construction the statute itself provides a penalty for overloading and looks to the recoverability of the freight as the yardstick by which to measure the penalty. It would be a surprising consequence if, when a statute enjoins that the increased earning capacity of the ship shall be the yardstick of the penalty, the contract under which that earning capacity accrues should in law be illegal. That fact alone is sufficient to explain why the legislature considered the contract of carriage to be a live contract. One must consider the circumstances in which the decisions in other cases came to be given. Every one of them concerned the terms upon which goods were to be supplied under a contract. The material statutory provisions struck at the manner in which a particular contract was to be performed. This statute is not concerned to strike at any contract at all. That distinguishes the present case from the *Anderson Ltd.* v. *Daniel* [15] type of case.

If that submission be right the provision in the preamble to the Act can be ignored because section 57 is clear from its text. For the defendants to succeed the court must decide that canons of public policy require this particular contract to be declared illegal. From time to time in the books one finds warnings about extending the ambit of the doctrine of public policy: see the words of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.* [16] and the speech of Lord Atkin in *Fender* v. *St. John-Mildmay.* [17]

[Devlin J. I accept the view that public policy is not a doctrine which ought to be extended in the sense of making new heads, but this is not that sort of case. This is an offence against the law. It is the consequences which flow from that offence which have to be considered.]

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[15] [1924] 1 K.B. 138.

[16] [1939] A.C. 277, 293.

[17] [1938] A.C. 1, 14; 53 T.L.R. 885; sub nom. *Fender* v. *Mildmay* [1937] 3 All E.R. 402.

The defendants' submission is that public policy demands that this particular contract should be declared unenforceable because of the infringement of the Act. That involves an extension of the ambit of the doctrine of public policy, but it is submitted that no such extension is here justified: some of the passages on which the defendants relied support this submission. The judgment of Scrutton L.J. in *Anderson Ltd.* v. *Daniel*[18] must be read in the light of the issue which was then before the court. In that case the contract necessitated compliance with certain statutory formalities, whereas in the present case it did not. If the view for which the plaintiffs contend on the construction of the statute and the true inference to be drawn therefrom be the correct view, that is the end of this case.

The defendants further contend that for the plaintiffs to recover their freight it is a condition precedent to establish that the goods were carried safely. That argument is erroneous. Conditions precedent involve mutual and concurrent obligations on each side. So far as the payment of freight is concerned, the obligation of the shipowner is to deliver the goods and that of the charterer to pay the freight on delivery. If all the goods are carried and delivered, but some are damaged, the full freight is still payable under the terms of the charter, though there might be a cross-action by the charterer for damages.

The facts do not support the defendants' contention that the plaintiffs deliberately intended to infringe the law. There can be nothing in that part of their case because the ship was not overloaded when she sailed. She only became so when she bunkered at Port Everglades.

No authority was cited by the defendants in support of the submission that an illegal act by the employer as distinct from an illegal act by his servant disentitled the employer to recover. Even if that proposition were sound it would carry the defendants no further because, on the facts, the overloading was clearly done by servants of the shipowner and not by the shipowner himself.

The defendants' submissions relating to United States and Panamanian law are irrelevant. If they are not, and if the other submissions for the plaintiffs are held to be wrong, then it is submitted that an illegality committed during part of the voyage is not sufficient to deprive the plaintiffs of their freight.

[Devlin J. The defendants submit that if part of the contract has been performed illegally, that is enough, but if that is wrong they are prepared to show illegality existed throughout the greater part of the performance.]

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[18] [1924] 1 K.B. 138, 146.

There would be far-reaching consequences if the court were to hold that a contract of this kind were unenforceable by the shipowners by reason of the infringement of this statute, as not only would freight be irrecoverable but, for example, demurrage would be irrecoverable. This would be inequitable. Exactly the same legal consequences would flow from the breach of other statutory provisions, e.g., the Regulations with regard to the Carriage of Grain made under section 24 (2) of the Merchant Shipping Act, 1949, and the Timber Regulations made under section 61 of the Act of 1932. This is a defence by consignees of part only of the cargo. Their claim presupposes that part of their particular cargo caused the vessel to be overloaded. They are seeking to take almost the whole benefit of the overloading for themselves when their cargo represented only a small part of the total. It is not for the defendants to take upon themselves the punishment of the shipowners. If the legislature considers that the penalties provided by the Act are insufficient it is for the legislature to amend the Act.

Wilmers in reply. It was conceded in opening that the defendants' main proposition is far-reaching. All cases of illegality are. Shipowners are in no special position. It is not true to say that in all the cases where this doctrine has been applied the statute strikes at the way in which goods are to be supplied under a contract: see *Taylor* v. *Crowland Gas and Coke Co.*,[19] where it was held that an unqualified person who had acted as a conveyancer could not recover for conveyances drawn by him, and *Cope* v. *Rowlands*,[20] where a broker who was not licensed under 6 Anne, c. 16, could not maintain an action for work and labour and commission for buying and selling stock.

[Devlin J. In *Cope* v. *Rowlands*[20] the contract was void from its inception, even if nothing was done under it. The same may apply to *Taylor* v. *Crowland Gas and Coke Co.*[21]]

It is difficult to see any distinction between the words of the Acts considered in those cases and section 44 of the Act of 1932. It is true that there is nothing in the section which prohibits the making of a contract for the carriage of grain, and it is conceded that in the two earlier cases the contracts concerned were prohibited, but the Act of 1932 regulates contracts of carriage by sea

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[19] (1854) 10 Exch. 293.

[20] (1836) 2 M. & W. 149.

[21] 10 Exch. 293.

1956

ST. JOHN SHIPPING CORPORATION
v.
JOSEPH RANK LTD.

by regulating the way in which shipowners may use their ships for the carriage of goods. There is no principle of law whereby these matters should be confined to questions concerning the sale of goods. [Reference was made to *Berg* v. *Sadler and Moore* [22] and *In re National Benefit Insurance Co. Ltd.*[23]]

[DEVLIN J. I agree. What impressed me more is the plaintiffs' submission that in other cases the statutes impliedly prohibited the making of a particular contract: see, for example, *B. & B. Viennese Fashions* v. *Losane*.[24]]

In *Bensley* v. *Bignold*,[25] which concerned an offence by a printer against section 27 of 39 Geo. 3, c. 79, in failing to print his name on a pamphlet, and where it was held that the printer could not recover the cost of labour or materials, there is a clear statement of the principle, cited in many other cases as the fountain head, that one cannot sue for work and labour done in direct contravention of an Act of Parliament: see the judgment of Abbott C.J.[26] and the judgments of Best and Bailey JJ.[27]

[DEVLIN J. That comes very near this case, but there the Act is striking at the particular contract. These plaintiffs argue here that you cannot point to the carriage of these particular goods as being illegal. All you can say is that these goods were part of the cargo which was carried illegally.]

Either there is an illegality or there is not. These particular goods were carried in this particular ship. Reliance is placed on the words of Best J. in *Bensley* v. *Bignold* [27] that a man "should "not be allowed to take advantage of what the law says he ought "not to do whether the thing be prohibited, because it is against "good morals, or whether it be prohibited, because it is against "the interests of the State." There is no distinction between *Forster* v. *Taylor*,[28] where butter was put into unmarked firkins, which was unlawful, and the present case where goods were put into a ship about which something was unlawful. The principle must be the same.

As to the plaintiffs' submissions on public policy, it is a matter of public policy that a person should not get a benefit from his crime: see *In the Estate of Crippen* [29] and *Beresford* v. *Royal Insurance Co. Ltd.*[30]

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[22] [1937] 2 K.B. 158; 53 T.L.R. 430; [1937] 1 All E.R. 637.

[23] [1931] 1 Ch. 46.

[24] [1952] 1 T.L.R. 750.

[25] 5 B. & Ald. 335.

[26] Ibid. 340.

[27] Ibid. 340, 341.

[28] 5 B. & Ad. 887.

[29] [1911] P. 108; 27 T.L.R. 258.

[30] [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602.

[Devlin J. All the cases say that a person cannot benefit from the fruits of his crime. You go further, and say that a person cannot benefit from carrying out a lawful act in an unlawful way. To deprive a man of 10 times as much as he would have received as benefit from his crime seems to me to be a very wide proposition. You are entitled to say about *Beresford's* case [30] that not all to which the plaintiff was entitled was benefit from his crime. This comes back to section 44 of the Act. If what the Act prohibits is a contract of loading, that is different from prohibiting a contract of carriage of goods in an overloaded ship.]

Here the contracts of carriage and of loading are the same. It is submitted that on the construction of section 44 the ship must comply with the regulations throughout.

As to the condition precedent, the plaintiffs submit that the argument for the defendants as to the safe carriage being a condition precedent is erroneous, that freight is expressed in the charter to be payable on delivery, and that therefore however the shipowner carries the goods, whether safely or not, he is still entitled to be paid full freight. All that that means is that delivery can be withheld if freight is not paid, but if the shipowner is in breach of a condition he could be sued in detinue. If he then sought to set up that clause in his defence, he could not do so if he had to show that in carrying the goods he was in breach of section 44. It is not sought to argue that any unsafe carriage makes it impossible to demand the freight if the goods are not carried unlawfully; what is said is that in his claim for freight the carrier cannot recover if the carriage was illegal. Finally, it is submitted that this court is bound by *Anderson Ltd.* v. *Daniel.*[31] That case was rightly decided and the principle stated by Atkin L.J. is sound in law and inescapable in the present case.

Roskill Q.C. The judgments in *Bensley* v. *Bignold* [32] carry the matter no further. On the question of public policy, where an Act expressly provides that a person shall not profit by his wrong there is no room for public policy to intervene because the machinery of the Act may be economically out of date. The defendants' proposition based on *Beresford* v. *Royal Insurance Co. Ltd.*[33] is too wide, as shown by Lord Wright M.R.[34] in the same case. See also Lord Atkin's speech.[35] On the true view of section 44 no right directly results from the fact that the section was infringed and the defendants cannot succeed on that point.

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[30] [1938] A.C. 586.
[31] [1924] 1 K.B. 138.
[32] 5 B. & Ald. 335.
[33] [1938] A.C. 586.
[34] [1937] 2 K.B. 197, 219.
[35] [1938] A.C. 586, 598.

Cur. adv. vult.

Oct. 29. Devlin J. read the following judgment: The continued depreciation of the pound is beginning to take effect on the criminal law. A maximum fine which at the time when Parliament fixed it would have been regarded as a sharp disincentive (if the word was then in use) may now prove to be little or no deterrent. In 1932 Parliament enacted the Merchant Shipping (Safety and Loadline Conventions) Act, 1932, which, inter alia, by sections 44 and 57, made it an offence to load a ship so that her loadline was submerged. The temptation to overload a freighter and so to submerge her marks is, of course, that the more she carries the more she will earn for the same expenditure on the voyage. So Parliament, when prescribing a fine as the punishment for an offence against section 44 related it to the earning capacity of the ship. The maximum fine was not to exceed the court's estimate of the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion; and was also not to exceed £100 for every inch or fraction of an inch by which the loadline was submerged. I suppose that in 1932 £100 was considered an outside figure of earning capacity per inch, but freights now are very different from what they were then.

When the master of the plaintiffs' ship *St. John* was prosecuted at Birkenhead under the Act and, on November 28, 1955, found to have overloaded his ship by more than 11 inches, he was fined the maximum of £1,200; but the amount of cargo by which the ship was overloaded was 427 tons and the extra freight earned was £2,295. So the ship came very well out of this situation; and she and other ships will doubtless continue to come very well out of similar situations until the Act of 1932 is amended.

I can see that it is a situation that must cause some concern to cargo owners whose property is at risk. The ship was carrying a cargo of about 10,000 tons of grain from Mobile, Alabama, U.S.A., to Birkenhead. The defendants held a bill of lading for about 3,500 tons of this quantity on which the freight due was nearly £19,000. The defendants, apparently in association with the charterers, decided that some additional punishment should be inflicted on the plaintiffs, and that it should take the form of withholding the £2,295 extra freight. The defendants have withheld £2,000, for which sum they are being sued in this action; and another cargo owner has withheld £295 and is being sued for it in an action that depends on this one.

This is the explanation of how this dispute has arisen. But I, of course, have not got to decide whether the defendants are morally justified in trying to make good deficiencies in the criminal law; nor is any justification of that sort put forward in the case. The defendants' case in law is that since the plaintiffs performed the contract of carriage, evidenced by the bill of lading, in such a way as to infringe the Act of 1932, they committed an illegality which prevents them from enforcing the contract at all; the defendants say they were not obliged to pay any freight, and so cannot be sued for the unpaid balance. If this is right, and if all the consignees had exerted to the full their legal powers, the effective penalty for the plaintiffs' misdeed would have been the loss of the whole freight of more than £50,000.

I do not, of course, regard an offence against the Act of 1932 as a trivial matter, particularly if it is committed deliberately, and if the safety of lives at sea is involved. It is an offence for which the master of a British ship (the plaintiffs' ship was registered in Panama) could be imprisoned. The agreed statement of facts, on which this case is being tried, does not say that the overloading in the U.S.A. was deliberate; for the purposes of the defendants' argument that finding is not required. But there is material in the agreed case which would make such a finding not at all improbable. The vessel was not overloaded when she left her loading port on November 2, 1955; she had then three-eighths of an inch to spare. But it seems plain that she was not then sufficiently bunkered to take her across the Atlantic. On November 5 she called at Port Everglades, Florida, for bunkers, and the 600 tons which she then took on caused her loadline to become submerged by about 10 inches. It is hard to believe that that fact was not appreciated at the time. As she went across the Atlantic her load was, of course, lightened by the consumption of bunkers, but, on the other hand, she passed into the winter zone and the net result was that when she arrived in the Mersey her loadline, as I have said, was submerged by more than 11 inches.

It is a misfortune for the defendants that the legal weapon which they are wielding is so much more potent than it need be to achieve their purpose. Believing, rightly or wrongly, that the plaintiffs have deliberately committed a serious infraction of the

Act and one which has placed their property in jeopardy, the defendants wish to do no more than to take the profit out of the plaintiffs' dealing. But the principle which they invoke for this purpose cares not at all for the element of deliberation or for the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned. The defendants cannot succeed unless they claim the right to retain the whole freight and to keep it whether the offence was accidental or deliberate, serious or trivial. The application of this principle to a case such as this is bound to lead to startling results. Mr. Wilmers does not seek to avert his gaze from the wide consequences. A shipowner who accidentally overloads by a fraction of an inch will not be able to recover from any of the shippers or consignees a penny of the freight. There are numerous other illegalities which a ship might commit in the course of the voyage which would have the same effect; Mr. Roskill has referred me by way of example to section 24 of the Merchant Shipping (Safety Conventions) Act, 1949, which makes it an offence to send a ship to sea laden with grain if all necessary and reasonable precautions have not been taken to prevent the grain from shifting. He has referred me also to the detailed regulations for the carriage of timber—similar in character to regulations under the Factories Acts—which must be complied with if an offence is not to be committed under section 61 of the Act of 1932. If Mr. Wilmers is right, the consequences to shipowners of a breach of the Act of 1932 would be as serious as if owners of factories were unable to recover from their customers the cost of any articles manufactured in a factory which did not in all respects comply with the Acts. Carriers by land are in no better position; again Mr. Wilmers does not shrink from saying that the owner of a lorry could not recover against the consignees the cost of goods transported in it if in the course of the journey it was driven a mile an hour over its permitted speed. If this is really the law, it is very unenterprising of cargo owners and consignees to wait until a criminal conviction has been secured before denying their liabilities. A service of trained observers on all our main roads would soon pay for itself. An effective patrol of the high seas would probably prove too expensive, but the maintenance of a corps of vigilantes in all principal ports would be well worth while when one considers that the smallest infringement of the statute or a regulation made thereunder would relieve all the cargo owners on the ship from all liability for freight.

Of course, as Mr. Wilmers says, one must not be deterred from enunciating the correct principle of law because it may have startling or even calamitous results. But I confess I approach the investigation of a legal proposition which has results of this character with a prejudice in favour of the idea that there may be a flaw in the argument somewhere.

Mr. Wilmers puts his case under three main heads. In the first place he submits that, notwithstanding that the contract of carriage between the parties was legal when made, the plaintiffs have performed it in an illegal manner by carrying the goods in a ship which was overloaded in violation of the statute. He submits as a general proposition that a person who performs a legal contract in an illegal manner cannot sue upon it, and he relies upon a line of authorities of which *Anderson Ltd.* v. *Daniel* [1] is probably the best known. He referred particularly to the formulation of the principle by Atkin L.J. [2] in the following passage: "The question of illegality in a contract generally arises in connexion with its formation, but it may also arise, as it does here, "in connexion with its performance. In the former case, where "the parties have agreed to something which is prohibited by "Act of Parliament, it is indisputable that the contract is "unenforceable by either party. And I think that it is equally "unenforceable by the offending party where the illegality arises "from the fact that the mode of performance adopted by the "party performing it is in violation of some statute, even though "the contract as agreed upon between the parties was capable of "being performed in a perfectly legal manner."

As an alternative to this general proposition and as a modification of it, Mr. Wilmers submits that a plaintiff cannot recover if, in the course of carrying out a legal contract made with a person of a class which it is the policy of a particular statute to protect, he commits a violation of that statute.

Secondly, he relies upon the well-known principle—most recently considered, I think, in *Marles* v. *Philip Trant & Sons* [3] —that a plaintiff cannot recover money if in order to establish his claim to it, he has to disclose that he committed an illegal act. These plaintiffs, he submits, cannot obtain their freight unless they prove that they carried the goods safely to their destination, and they cannot prove that without disclosing that they carried them illegally in an overloaded ship.

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[1] [1924] 1 K.B. 138.

[2] Ibid. 149.

[3] [1954] 1 Q.B. 29; [1953] 1 All E.R. 651.

Thirdly, he relies upon the principle that a person cannot enforce rights which result to him from his own crime. He submits that the criminal offence committed in this case secured to the plaintiffs a larger freight than they would have earned if they had kept within the law. A part of the freight claimed in this case is therefore a benefit resulting from the crime and in such circumstances the plaintiff cannot recover any part of it.

I am satisfied that Mr. Wilmers's chief argument is based on a misconception of the principle applied in *Anderson Ltd.* v. *Daniel*,[4] which I have already cited. In order to expose that misconception I must state briefly how that principle fits in with other principles relating to illegal contracts. There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

The principle enunciated by Atkin L.J.[5] and cited above is an offshoot of the second principle that a prohibited contract will not be enforced. If the prohibited contract is an express one, it falls directly within the principle. It must likewise fall within it if the contract is implied. If, for example, an unlicensed broker sues for work and labour, it does not matter that no express contract is alleged and that the claim is based solely on the performance of the contract, that is to say, the work and labour done; it is as much unenforceable as an express contract made to fit the work done. The same reasoning must be applied to a contract which, though legal in form, is performed unlawfully. Jenkins L.J. in his illuminating judgment in *B. and B. Viennese Fashions* v. *Losane* [6] has shown how illogical it would be if the law were otherwise. In that case the regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering to the buyer without objection utility garments to which the regulations did apply; and he did not furnish the invoice. If the court enforced his claim for the price of the garments, it would have, in effect, been enforcing a contract for the supply of utility garments without furnishing an invoice, which, had it originally been made in that form, would have been prohibited. But whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute?

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[4] [1924] 1 K.B. 138.

[5] Ibid. 149.

Mr. Wilmers's proposition ignores this test. On a superficial reading of *Anderson Ltd.* v. *Daniel* [7] and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract is itself legal, if something illegal is done under it. But that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute.

All the cases which Mr. Wilmers cited in support of his submission show, I think, that this is the true basis. Some of the earlier cases on which he relied—those in which the principle was first being formulated—show this most clearly; and I take as an example of them *Cope* v. *Rowlands*.[8] In that case the plaintiff brought an action for work and labour done by him as a broker and the plea was that he was not duly licensed to act as a stockbroker pursuant to the statute. The statute imposed a penalty on any unlicensed person acting as a broker. Parke B.[9] (the italics below are those in the report) declared the law to be as follows: "It is perfectly settled, that where the contract "which the plaintiff seeks to enforce, be it express or implied, is "expressly or by implication forbidden by the common or statute "law, no court will lend its assistance to give it effect. It is "equally clear that a contract is void if prohibited by a statute, "though the statute inflicts a penalty only, because such a "penalty implies a prohibition. . . . And it may be safely laid "down, notwithstanding some dicta apparently to the contrary, "that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has "in view the protection of the revenue, or any other object. The "sole question is, whether the statute *means to prohibit the* "*contract*?" After considering the language of the Act Parke B. went on to say[10] that the language "shows clearly that the "legislature had in view, as *one* object, the benefit and security "of the public in those important transactions which are "negotiated by brokers. The clause, therefore, which imposes "a penalty, must be taken . . . to imply a prohibition of all "unadmitted persons to act as brokers, and consequently to "prohibit, by necessary inference, all contracts which such "persons make for compensation to themselves for so acting; and "this is the contract on which this action is . . . brought."

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[6] [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909, 913.

[7] [1924] 1 K.B. 138.

[8] (1836) 2 M. & W. 149.

[9] Ibid. 157.

Now this language—and the same sort of language is used in all the cases—shows that the question always is whether the statute meant to prohibit the contract which is sued upon. One of the tests commonly used, and frequently mentioned in the later cases, in order to ascertain the true meaning of the statute is to inquire whether or not the object of the statute was to protect the public or a class of persons, that is, to protect the public from claims for services by unqualified persons or to protect licensed persons from competition. Mr. Wilmers (while saying that, if necessary, he would submit that the Act of 1932 was passed, inter alia, to protect those who had property at sea) was unable to explain the relevance of this consideration to his view of the law. If in considering the effect of the statute the only inquiry that you have to make is whether an act is illegal, it cannot matter for whose benefit the statute was passed; the fact that the statute makes the act illegal is of itself enough. But if you are considering whether a contract not expressly prohibited by the Act is impliedly prohibited, such considerations are relevant in order to determine the scope of the statute.

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[10] 2 M. & W. 159.

This, then, is the principle which I think is to be derived from the class of cases which Mr. Wilmers cited. Not unnaturally, he cited those cases in which the result at least was consistent with the proposition for which he was contending. Had he cited those cases in which the claim succeeded because the statute was held not to imply a prohibition of any contract, he would, I think, have seen the fallacy in his argument. For that submits the point to the crucial test. The plaintiff does an illegal act, being one prohibited by the statute, but he does it in performance of a legal contract, since the statute is construed as prohibiting the act merely and not prohibiting the contract under which it is done. If in such a case it had been held that it did not matter whether the contract was legal or not since the mode of performing it was illegal, Mr. Wilmers's argument would be well supported. But in fact the contrary has been held. I take as an example of cases of this type, *Wetherell* v. *Jones.*[11] The plaintiff sued for the price of spirits sold and delivered. A statute of George IV provided that no spirits should be sent out of stock without a permit. The court held that the permit obtained by the plaintiff was irregular because of his own fault and that he was therefore guilty of a violation of the law, but that the statute did not prohibit the contract. Tenterden C.J. stated the law as follows[12]: " Where a contract which a plaintiff seeks to enforce " is expressly, or by implication, forbidden by the statute or " common law, no court will lend its assistance to give it effect: " and there are numerous cases in the books where an action on " the contract has failed, because either the consideration for " the promise or the act to be done was illegal, as being against " the express provisions of the law, or contrary to justice, " morality, and sound policy. But where the consideration and " the matter to be performed are both legal, we are not aware " that a plaintiff has ever been precluded from recovering by an " infringement of the law, not contemplated by the contract, in " the performance of something to be done on his part."

The last sentence in this judgment is a clear and decisive statement of the law; it is directly contrary to the contention which Mr. Wilmers advances, which I therefore reject both on principle and on authority.

So Mr. Wilmers's wider proposition fails. Mr. Roskill is right in his submission that the determining factor is the true effect and meaning of the statute, and I turn therefore to consider Mr. Wilmers's alternative proposition that the contract evidenced by the bill of lading is one that is made illegal by the Act of 1932. I have already indicated the basis of this argument, namely, that the statute being one which according to its preamble is passed to give effect to a convention "for promoting "the safety of life and property at sea," it is therefore passed for the benefit of cargo owners among others. That this is an important consideration is certainly established by the authorities. But I follow the view of Parke B. in *Cope* v. *Rowlands*,[13] which I have already cited, that it is one only of the tests. The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive.

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[11] (1832) 3 B. & Ad. 221.

[12] Ibid. 225.

Two questions are involved. The first—and the one which hitherto has usually settled the matter—is: does the statute mean to prohibit contracts at all? But if this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit? For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles or for the repairing of unlicensed vehicles or for the garaging of unlicensed vehicles, the answer may well be different. The answer might be that collateral contracts of this sort are not within the ambit of the statute.

The relevant section of the Act of 1932, section 44, provides that the ship "shall not be so loaded as to submerge" the appropriate loadline. It may be that a contract for the loading of the ship which necessarily has this effect would be unenforceable. It might be, for example, that the contract for bunkering at Port Everglades which had the effect of submerging the loadline, if governed by English law, would have been unenforceable. But an implied prohibition of contracts of loading does not necessarily extend to contracts for the carriage of goods by improperly loaded vessels. Of course, if the parties knowingly agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute, since it falls within the first of the two general heads of illegality I noted above where there is an intent to break the law. The way to test the question whether a particular class of contract is prohibited by the statute is to test it in relation to a contract made in ignorance of its effect.

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[13] 2 M. & W. 149.

In my judgment, contracts for the carriage of goods are not within the ambit of this statute at all. A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference," as Parke B. put it,[14] that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case—perhaps of such triviality that no authority would have felt it worth while to prosecute—a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality. In *Vita Food Products Inc.* v. *Unus Shipping Co.*[15] Lord Wright said[16]: "Nor must it be forgotten that the rule by which "contracts not expressly forbidden by statute or declared to be "void are in proper cases nullified for disobedience to a statute "is a rule of public policy only, and public policy understood in "a wider sense may at times be better served by refusing to "nullify a bargain save on serious and sufficient grounds." It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done. I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear. I have felt justified in saying as much because, to any judge who sits in what is called the Commercial Court, it must be a matter of special concern. This court was instituted more than half a century ago so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it.

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[14] 2 M. & W. 159.

[15] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

[16] [1939] A.C. 277, 293.

I think also that it is proper, in determining the scope of the statute, to have regard to the consequences I have already described and to the inconveniences and injury to maritime business which would follow from upholding the defendants' contention in this case. In the light of all these considerations I should not be prepared to treat this statute as nullifying contracts for the carriage of goods unless I found myself clearly compelled by authority to do so. I can find no such authority in the cases which Mr. Wilmers has cited, nor even any analogous cases in which the law has been stretched as far. Of course, the construction of each Act depends upon its own terms, but I can find no authority in which any Act has been given anything like so wide an effect as Mr. Wilmers wants the Act of 1932 to be given. In the statutes to which the principle has been applied, what was prohibited was a contract which had at its centre—indeed often filling the whole space within its circumference—the prohibited act; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statute specifically said there must be accompanying documents; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense. It is going a long way further to say that contracts which depend for their performance upon the use of an instrument which has been treated in a forbidden way should also be forbidden. In the only case I have seen where the contention appeared to go as far as that the claim failed. The relevant facts in *Smith* v. *Mawhood*[17] appear sufficiently from the judgment of Alderson B.,[18] where he also dealt with the contention: "But here the legislature has merely "said, that where a party carries on the trade or business of a "dealer in or seller of tobacco, he shall be liable to a certain "penalty, if the house in which he carries on the business shall "not have his name, etc., painted on it, in letters publicly "visible and legible, and at least an inch long, and so forth. "He is liable to the penalty, therefore, by carrying on the trade "in a house in which these requisites are not complied with; "and there is no addition to his criminality if he makes fifty "contracts for the *sale* of tobacco in such a house. It seems to "me, therefore, that there is nothing in the Act of Parliament "to prohibit every act of sale, but that its only effect is to impose "a penalty, for the purpose of the revenue, on the carrying on "of the trade without complying with its requisites."

A contract for the sale of tobacco was therefore not to be considered void merely because the premises in which the tobacco was sold did not comply with the law. So it might be said that a contract for carriage of goods is not to be considered void merely because the ship in which they are carried does not comply with the law. But I recognize that each case must be determined by reference to the relevant statute and not by comparison with other cases. I reach my conclusion—in the words of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co.*[19]—on "the true construction of the statute, having "regard to its scope and its purpose and to the inconvenience "which would follow from any other conclusion."

In view of the importance of this question, I have thought it right to determine it upon general grounds rather than upon the particular wording of section 44. But I must note that Mr. Roskill also particularly relies upon the wording of subsection (2) of that section. This subsection, to which I have already referred, is the one which says that the fine is to be such "as the court thinks fit to impose having regard to the "extent to which the earning capacity of the ship was, or would "have been, increased by reason of the submersion." Mr. Roskill submits that this shows that the statute contemplated that, notwithstanding the breach of it, there would be an "earning "capacity" and, therefore, that contracts for the payment of freight must be intended to remain alive. I note that a similar point was taken in *Forster* v. *Taylor*,[20] but it was not necessary for the court to deal with it.

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[17] (1845) 14 M. & W. 452.

[18] Ibid. 464.

[19] [1939] A.C. 277, 295.

I turn now to Mr. Wilmers's second point. He submitted that the plaintiffs could not succeed in a claim for freight without disclosing that they had committed an illegality in the course of the voyage; or, put another way, that part of the consideration for the payment of freight was the safe carriage of the goods, and therefore they must show that they carried the goods safely. In the passage I have quoted from the judgment in *Wetherell* v. *Jones*,[21] Tenterden C.J.[22] carefully distinguished between an infringement of the law in the performance of the contract and a case where " the consideration and the matter to be performed " were illegal. There is a distinction there—of the sort I have just been considering—between a contract which has as its object the doing of the very act forbidden by the statute, and a contract whose performance involves an illegality only incidentally. It may be, therefore, that the second point is the first point looked at from another angle. However that may be, there is no doubt that if the plaintiffs cannot succeed in their claim for freight without showing that they carried the goods in an overloaded ship, they must fail.

But, in my judgment, the plaintiffs need show no more in order to recover their freight than that they delivered to the defendants the goods they received in the same good order and condition as that in which they received them. Indeed, they are entitled to recover their freight without deduction (but subject to counterclaim) if the goods they delivered were substantially the same as when loaded: see Scrutton on Charterparties, 16th ed., p. 391, art. 144. It may be true that it is a term of the contract of carriage that the goods should be carried safely. Article III of the Hague Rules provides, for example, in rule 2, " that the carrier shall properly and carefully load, handle, stow, " carry, keep, care for and discharge the goods carried." But no one has ever heard of a claim for freight being supported by a string of witnesses describing the loading, handling, stowing, keeping, caring for and discharging the goods. The truth is that if the goods have been delivered safely, it must follow that they have been carried safely. If, therefore, they are proved to have been delivered undamaged, the shipowner need prove no more. The law is that they shall be carried safely—not that they should not be exposed to danger on the voyage. If the plaintiffs had to prove that they were not exposed to danger on the voyage, then no doubt they would also have to prove that the ship complied with all the safety regulations affecting her; but in the claim for freight they need only prove safe delivery. This point fails.

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[20] (1834) 5 B. & Ad. 887, 889.

[21] 3 B. & Ad. 221.

[22] Ibid. 225.

On Mr. Wilmers's third point I take the law from the dictum in *Beresford* v. *Royal Insurance Co. Ltd.*[23] that was adopted and applied by Lord Atkin[24]: "no system of jurisprudence can "with reason include amongst the rights which it enforces rights "directly resulting to the person asserting them from the crime "of that person." I observe in the first place that in the Court of Appeal in the same case Lord Wright[25] doubted whether this principle applied to all statutory offences. His doubt was referred to by Denning L.J. in *Marles* v. *Philip Trant & Sons*,[26] which I have already cited. The distinction is much to the point here. The Act of 1932 imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a curious thing if the operation could be performed twice—once by the criminal law and then again by the civil. It would be curious, too, if in a case in which the magistrates had thought fit to impose only a nominal fine, their decision could, in effect, be overridden in a civil action. But the question whether the rule applies to statutory offences is an important one which I do not wish to decide in the present case. The dicta of Lord Wright[27] and Denning L.J.[28] suggest that there are cases where its application would be morally unjustifiable; but it is not clear that they go as far as saying that the application would not be justified in law. I prefer, therefore, to deal with Mr. Wilmers's submission in another way.

The rights which cannot be enforced must be those "directly "resulting" from the crime. That means, I think, that for a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title. That cannot be said in this case. The amount of the profit which the plaintiffs made from the crime, that is to say, the amount of freight which, but for the overloading, they could not have earned on this voyage, was, as I have said, £2,295. The quantity of cargo consigned to the defendants was approximately 35 per cent.

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[23] [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602.

[24] [1938] A.C. 586, 596.

[25] [1937] 2 K.B. 197, 220; 53 T.L.R. 583; [1937] 2 All E.R. 243.

[26] [1954] 1 Q.B. 29, 37.

[27] [1937] 2 K.B. 197, 220.

[28] [1954] 1 Q.B. 29, 37.

of the whole and, therefore, even if it were permissible to treat the benefit as being divisible pro rata over the whole of the cargo, the amount embodied in the claim against the defendants would not be more than 35 per cent. of £2,300. That would not justify the withholding of £2,000. The fact is that the defendants and another cargo owner have between them withheld money, not on a basis that is proportionate to the claim against them, but so as to wipe out the improper profit on the whole of the cargo. I do not, however, think that the defendants' position would be any better if they had deducted no more than the sum attributable to their freight on a pro rata basis. There is no warrant under the principle for a pro rata division; it would be just as reasonable to say that the excess freight should be deemed to attach entirely to the last 427 tons loaded, leaving the freight claim on all the rest unaffected. But in truth there is no warrant for any particular form of division. The fact is that in this type of case no claim or part of a claim for freight can be clearly identified as being the excess illegally earned.

In *Beresford* v. *Royal Insurance Co. Ltd.*[29] the court dismissed the claim of a personal representative who claimed on policies of life insurance which had matured owing to the assured committing suicide in circumstances that amounted to a crime. Mr. Wilmers submitted that the only benefit which the assured or his estate derived from the claim was the acceleration of the policies and that notwithstanding that some of the policies had been in force for a considerable time and therefore, I suppose, had a surrender value before the suicide was committed, the plaintiff was not allowed to recover anything. So in the present case, he submits, the commission of the crime defeats the whole claim to freight notwithstanding that the earning of the greater part of it was irrespective of the crime.

The comparison does not seem to me to be just. In *Beresford* v. *Royal Insurance Co. Ltd.*,[29] but for the crime committed by the assured, no part of the policy moneys could have been claimed in that form, that is to say, as money repayable on the happening of the event insured against, or at that time. That does not necessarily mean that, so far as public policy was concerned, the plaintiff could recover nothing. If the plaintiff, for example, had sued for the return of premiums, assuming the contract permitted it, I have not been referred to any observation in the case which would suggest that an action in that form would fail on the grounds of public policy. The claim which the court was considering under the policy depended entirely upon proof of death and the death was a crime. In the present case the right to claim freight from the defendants was not brought into existence by a crime; the crime affected only the total amount of freight earned by the ship.

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[29] [1938] A.C. 586.

The result is that there must be judgment for the plaintiffs for £2,000. But the defendants will not have fought the action altogether in vain if it brings to the attention of the competent authorities the fact that section 44 of the Act of 1932 is out of date and ought to be amended. I have already noted that for a similar offence a British master can be imprisoned and it must be very galling for those concerned to see a foreign master do the same thing without the law providing any effective deterrent.

Judgment for plaintiffs.

Solicitors: *Constant & Constant; Bentleys, Stokes & Lowless.*

E. M. W.

C. A.

1956
Oct. 23, 24, 25, 26, 29.

Lord Evershed M.R., Birkett and Romer L.JJ.

PADDINGTON BOROUGH COUNCIL *v.* WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. *v.* PADDINGTON BOROUGH COUNCIL.

Compulsory Purchase—Compensation—War-damaged property—Total destruction of premises—Determination to make cost of works payment—Notional reinstatement—Assessment of compensation—"If "the damage had been made good"—Meaning—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 53.

War Damage—Cost of works payment—Total loss—Discretion to make cost of works payment exercised—Decision communicated to landowner—Damage not made good—Compulsory purchase—Whether decision binding—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 8, 20 (1).

In 1940 and 1944 premises in London suffered war damage, which resulted in the buildings on the site becoming a total loss. On May 4, 1945, the War Damage Commission sent to the claimants, as lessees, and to the freeholders, a form Val. 4 which stated that the war damage did not involve a total loss and that the commission would make a payment of cost of works in respect of the property. It was admitted by the War Damage Commission that Val. 4 was incorrect in stating that the war damage did not involve total loss, but the commission, being satisfied that the

PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. v. PADDINGTON BOROUGH COUNCIL.

premises were of such a nature as to fall within section 20 (1) of the War Damage Act, 1943, had determined pursuant to the Treasury direction given under that section to make a payment of cost of works. Subsequent to the receipt of Val. 4, the claimants entered into negotiations with the commission with regard to the erection of a new building on the site. The building which had been destroyed was of an elaborate character and the claimants prepared plans for the erection of a modern building in its place, the cost of the erection of which would be considerably less than the cost of replacing the original building, but the value of the premises would, when the modern building was completed, be greater than if the original building had been exactly reproduced. The commission agreed to the claimant's proposals. On May 9, 1950, before work had been started on the new building, the local authority served notice to treat on the claimants pursuant to a compulsory purchase order.

The Lands Tribunal held that the commission had made a binding determination to make a payment of cost of works and that the compensation payable by the council should be assessed pursuant to the provisions of section 53 of the Town and Country Planning Act, 1947,[1] on the basis that the war damage had been

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[1] Town and Country Planning Act, 1947, s. 53: "(1) Where an "interest in land the value of which "is to be ascertained in accordance "with the provisions of section 51 "of this Act is an interest in a "hereditament or part of a hereditament which has sustained war "damage, and any of that damage "has not been made good at the "date of the notice to treat, then if "the appropriate payment under the "War Damage Act, 1943 would, "apart from the compulsory purchase "or apart from any direction given "by the Treasury under paragraph "(*b*) of subsection (2) of section 20 "of that Act, be a payment of cost "of works—(*a*) the value of the "interest for the purposes of the "compensation payable in respect of "the compulsory purchase shall, "subject to the provisions of this "section, be taken to be the value "which it would have if the whole "of the damage had been made good "before the date of the notice to "treat; and (*b*) the right to receive "any value payment or share of a "value payment which, under the "War Damage Act, 1943, is payable "in respect of the interest which is "compulsorily acquired (including "any interest payable thereon) shall, "notwithstanding anything in that "Act, vest in the person by "whom the interest is so acquired. "(2) Where, under subsection (1) of "this section, the value of any "interest in land comprised in a "hereditament is required to be taken "to be the value which that interest "would have if war damage sustained by that hereditament had "been made good before the date "of the notice to treat, and any "works, other than works for making "good the war damage, have been "carried out on the land since the "occurrence of the war damage, then "if the making good of the war "damage would involve the removal "of those works, the value of the "said interest shall be taken to "be—(*a*) the value which it would "have if the war damage had been "made good and those works had "been removed; or (*b*) the value "which it would have if the war "damage had not been made good "so far as the making good would "have involved the removal of those "works, whichever is the higher.

"(3) Where an interest in land "is acquired by agreement in pursuance of a contract made after

C. A.

1956

PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. v. PADDINGTON BOROUGH COUNCIL.

made good before the notice to treat. The tribunal further held that "if the whole of the damage had been made good" in section 53 (1) (*a*) of the Act of 1947 meant as if the premises had been reinstated in their identical form before the war damage:—

Held, (1) that under the provisions of the War Damage Act, 1943, the War Damage Commission could make an effective determination as to the kind of payment to be made in respect of war damaged premises before the actual date when the payment could be called for and that, on the facts, when regard was had to the Treasury direction, the payment which the commission would have made in respect of these premises would have been a payment of cost of works and, accordingly, that compensation must be assessed in accordance with the provisions of section 53 of the Act of 1947.

(2) That the phrase "if the whole of the damage had been "made good" in section 53 (1) (*a*) of the Act of 1947 was equivalent to the phrase "if the work had been done for which, on "the facts of the case as proved, the appropriate cost of works "payment would have been made" and that, on the facts, the making good would have taken the form of a modern building reconstructed in accordance with the plans of the claimants and the local authority were bound to pay to them the value that building would have had if the damage had been so made good.

Per curiam. Prima facie, the phrase "had been made good" was equivalent to "had been reinstated" and that was the proper test to apply, unless it were shown that, as a result of negotiations with the commission or otherwise, the proviso to section 8 (2) of the War Damage Act, 1943,[2] operated, so that it could be said,

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"the appointed day by a person "authorized by virtue of any enact-"ment to acquire it compulsorily, "being an interest in a hereditament "or part of a hereditament which has "sustained war damage any part of "which has not been made good "before the date of the contract, then "if the appropriate payment under "the War Damage Act, 1943, would, "apart from the acquisition or apart "from any direction given by the "Treasury under paragraph (*b*) of "subsection (2) of section 20 of that "Act be a payment of cost of works, "the right to receive any value pay-"ment or share of the value pay-"ment which, under that Act, is "payable in respect of the interest "so acquired (including any interest "payable thereon) shall, notwith-"standing anything in that Act, vest "in the person by whom the interest "is acquired as aforesaid."

[2] War Damage Act, 1943, s. 8 (1): "Subject to the provisions of "this Part of this Act, the amount of "a payment of cost of works shall "be computed as provided by sub-"sections (2) to (4) of this section. "(2) If the war damage is made "good by reinstating the heredita-"ment in the form in which it "existed immediately before the "occurrence of the damage, the "amount of the payment shall be "an amount equal to the proper cost "of the works executed for the "making good thereof: Provided "that if the reinstatement of any "part of the hereditament could have "been omitted without detracting "from the value of the hereditament, "or the omission thereof would have "increased its value, the amount of "the payment shall be reduced to "what it would have been if that "part had not been reinstated. In "this Part of this Act the expression "'the permissible amount' means, "in relation to a payment of cost of "works, the amount that is payable

C. A.

1956

PADDINGTON BOROUGH COUNCIL *v.* WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. *v.* PADDINGTON BOROUGH COUNCIL.

but for the compulsory acquisition, particular work and no other would have been done for which a payment of cost of works of a specific amount would have been made.

East End Dwellings Co. Ltd. v. *Finsbury Borough Council* [1952] A.C. 109; [1951] 2 T.L.R. 486; [1951] 2 All E.R. 587 considered.

APPEALS from the Lands Tribunal by case stated.

These two appeals were heard together both by the Lands Tribunal and the Court of Appeal.

The following statement of facts is taken from the case stated. "This was a reference and two appeals which the parties agreed "should be heard together. . . . 3. The reference was an application by Associated London Properties Ltd. (hereinafter called "'the claimants') in respect of the compensation for the compulsory purchase of their interest in land.

"4. The two appeals were by the Paddington Borough "Council (hereinafter called 'the acquiring authority') under "the War Damage Act, 1943 (hereinafter called 'the Act of "'1943') in relation to a determination and valuation made by "the War Damage Commission.

"5. The property concerned is known as Irvine Court, No. 37, "Porchester Terrace, Paddington.

"6. We found the following facts proved: (*a*) The property "comprised two blocks of residential flats erected before 1914

"by virtue of this subsection or "that would have been payable if this "subsection had had effect in relation to the payment. (3) If the "war damage is made good by works "which include alterations or additions to the hereditament, the "amount of the payment shall be an "amount equal to so much of the "proper cost of the works executed "for the making good of the damage "as falls within the permissible "amount."

S. 20: "(1) The Treasury shall "give directions to be observed by "the commission for securing that "the provisions of this Part of this "Act relating to the making of payments in respect of war damage "shall be executed in conformity "with the public interest as respects "town and country planning, the "provision of housing accommodation, the development of industries "and services and of agriculture, the "preservation of amenities, the consumption of supplies of building "materials for the time being available, the building requirements of "persons engaged in work of public "importance and such other matters "as may be prescribed . . . (3) For "the purpose of giving effect to any "such directions, the commission "shall have power, whether such a "notice as aforesaid has been "published or not,— . . . (*b*) where "war damage in respect of which a "value payment would otherwise be "appropriate is made good in the "public interest, to make in respect "thereof a payment of cost of works, "or payments as specified in paragraphs (*a*) and (*b*) respectively of "subsection (1) of section 13 of this "Act but limited as respects the "payment to be made under the said "paragraph (*a*) to works executed in "the public interest."

C. A.
1956

PADDINGTON BOROUGH COUNCIL
v.
WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD.
v.
PADDINGTON BOROUGH COUNCIL.

"and was held by the claimants under three several leases dated "respectively July 2, 1923, February 19, 1925, and March 23, "1925, made between the trustees of the Paddington Estate of "the first part, the Ecclesiastical Commissioners for England of "the second part, and Arthur Octavius Edwards of the third part "for a term of years expiring on March 25, 2020. The reversion "expectant on the term of years is vested in the Church Com-"missioners for England. (*b*) The property suffered war damage "on three separate occasions, namely, October 25, 1940, "February 18, 1944, and March 14, 1944. The war damage was "such as to be deemed to involve total loss for the purposes of "the Act of 1943. (*c*) The War Damage Commission considered "that the property was immediately before the occurrence of the "war damage structurally not appreciably less sound than when "it was erected and in design, layout and amenities reasonably "similar to property of the same type erected since 1914, and "would therefore fall within the class of case in which the com-"mission had been directed by the Treasury under the provisions "of section 20 (1) of the Act of 1943, to exercise the powers "conferred on them by subsection (3) (*b*) of that section in the "event of the war damage to the property being made good. "(*d*) On May 4, 1945, the War Damage Commission sent to the "claimants the document in Form VAL. 4."

A copy of Val. 4 was exhibited to the case stated and so far as relevant was in the following terms:

"Dear Sir (or Madam),

"1. Inspection of this property now indicates that the war "damage up to 30.9.45 did not involve 'total loss' as defined "in the War Damage Act, 1943. The test for 'total loss' does "not relate solely to the amount of the damage and even complete "destruction does not necessarily make a building a 'total loss' "under the Act.

"2. This letter means that the commission will in due course "pay a claim for the reasonable cost of making good the war "damage to this property (a cost of works payment) after the "works have been carried out."

The case stated then continued: "(*e*) After May 4, 1945, "interviews took place between representatives of the claimants "and the War Damage Commission on the assumption that there "would be a cost of works payment, and the claimants were "invited by the War Damage Commission to prepare and submit "proposals for rebuilding and to obtain tenders for the work, and "the claimants procured the appropriate plans and specifications

C. A.
1956

PADDINGTON BOROUGH COUNCIL
v.
WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD.
v.
PADDINGTON BOROUGH COUNCIL.

“ for the rebuilding and incurred considerable expense in so doing. “ The War Damage Commission and the claimants agreed such “ plans which provided for reinstatement with alterations “ involving the omission of former ornamentation and a lesser cubic “ content. (*f*) On November 5, 1946, a compulsory purchase “ order in favour of the acquiring authority was made in respect “ of an area which included the site of Irvine Court. The order “ was duly confirmed by the Minister of Health on July 31, 1947. “ On May 9, 1950, the acquiring authority served notice to treat. “ (*g*) On January 19, 1951, the War Damage Commission issued “ in connexion with the property a formal determination of the “ amount of the converted value payment in Form VAL. 8 “ (C. P.).”

Val. 8, which was exhibited to the case stated, was so far as relevant in the following terms: “ War Damage Commission. “ Notice of Determination of the amount of a value payment “ payable by virtue of section 14 of the War Damage Act, “ 1943. . . . The War Damage Commission give notice that they “ have today determined that the war damage to the above “ described hereditament did not involve total loss, and that, “ apart from the provisions of section 14 (1) of the War Damage “ Act, 1943, a cost of works payment would be appropriate. “ Since, however, the hereditament is to be or has been acquired “ by an authority having power to purchase it compulsorily a “ value payment is payable in respect of any war damage which “ had not been made good at the date of acquisition. The commission further give notice that they have today determined “ that the amount of such value payment is £16,500.”

The case stated continued: “ (*h*) The actions of the War “ Damage Commission hereinbefore referred to are explained in a “ letter dated April 16, 1953, addressed to the claimants' “ solicitors.”

In that letter the commission explained the position as follows: “ The hereditament comprising Irvine Court sustained “ war damage on several occasions, the last being in March, “ 1944, when the building was so badly damaged that it was “ demolished and the site cleared. The commission took the “ view that under the formula prescribed in section 7 (2) of the “ War Damage Act, 1943, the war damage had clearly involved “ ‘ total loss.’ This seemed so clear that it was not thought “ necessary to make any detailed estimate of the cost of “ rebuilding or to compute the two values, the difference between “ which has, under the formula, to be weighed against the "notional cost or reinstatement. In March, 1945, your clients "produced the plans of the property to the commission and "satisfied the commission that the building had been of such a "nature as to fall within the class of case in which the commission had been directed by the Treasury under the provisions of "section 20 (1) of the War Damage Act to exercise the powers "conferred on them by subsection (3) (*b*) of that section. A "copy of the Treasury direction is enclosed herewith. On "March 30, 1945, the commission sent your clients a letter in "form Val. 4, a specimen copy of which is also enclosed. "You will see from paragraph 1 of this letter that the commission declared that the war damage had not involved 'total loss.' "This statement was incorrect but the point at that time was "apparently not thought to be material as, in view of the application of the Treasury direction, the appropriate payment was a "payment of cost of works, whatever the result of the test "prescribed in section 7 (2). The commission would be bound "by the issue of that letter to make a payment of cost of works "to any person who incurred the cost of works for making good "the war damage to the property."

The case stated proceeded to exhibit certain letters with regard to the erection of modern flats in place of the original building, which showed that the estimated cost of rebuilding the original building with its detailed finish would be £56,300, and the cost of erecting a modern building comprising flats would be £49,000. The commission agreed to the claimants' proposal for the erection of modern flats and approved their preliminary plans and specifications for this building. The case stated then continued:

"7. It was contended by the claimants: (*a*) That by their "document of May 4, 1945, or by their document of January 19, "1951 (referred to in paragraph 6 (*g*) hereof), the War Damage "Commission must be deemed to have given their final determination that a cost of works payment was appropriate; "(*b*) That the compensation payable by the acquiring authority "falls to be assessed in accordance with the provisions of "section 53 of the Town and Country Planning Act, 1947 (hereinafter called 'the Act of 1947'); and (*c*) That the words "'made good' in the said section 53 should be construed as "extending to 'making good with alterations' as provided for "in section 8 (3) of the Act of 1943, and are not limited to "identical reinstatement of the original building.

"8. It was contended by the acquiring authority: (*a*) That "the appropriate payment under the Act of 1943 in respect of the "war damage to the property was a value payment; (*b*) That "the compensation payable to the claimants by the acquiring "authority did not fall to be assessed on the basis laid down "in section 53 of the Act of 1947; and (*c*) In the alternative, "that in assessing compensation under section 53 of the Act of "1947 the value of the property must be taken to be the value "which it would have if the damage had been made good by an "identical reinstatement and not with alterations or additions.

"9. It was contended by the War Damage Commission: "(*a*) That by virtue of (1) the said document Val. 4, the War "Damage Commission had finally determined that the kind of "payment to be made in due course under the Act of 1943 in "respect of the said war damage was a cost of works payment "under section 20 of the Act of 1943 in accordance with the "said Treasury direction and had become bound by such determination; (*b*) That the said determination was made and had "become binding before the date of the said compulsory purchase "order; and (*c*) That although at the date of the said determination none of the war damage to the property had been made "good, the War Damage Commission then had power to make "such binding determination as aforesaid.

"10. We came to the conclusion that in the use of the "document Form Val. 4, which was a stereotyped printed form, "a mistake had been made by the War Damage Commission in "that the document stated that the war damage did not involve "total loss, whereas it is now clear, and we can accept the fact, "that the war damage did involve total loss.

"11. We also came to the conclusion that it was clear from "correspondence and actions of the War Damage Commission "that what the War Damage Commission intended to convey in "this document was that, although the hereditament suffered "total loss, the payment was to be a cost of works payment by "virtue of the said Treasury direction. We decided to interpret "document Form Val. 4 as if it had been amended to give "effect to this intention.

"12. We further decided this document Form Val. 4 was a "final determination by the War Damage Commission.

"13. From the evidence which was adduced before us we had "no doubt whatever that the War Damage Commission intended "to treat the said property on the footing of what is known as a "cost of works payment, and the evidence further confirmed us "in the opinion that it was never the intention of the War "Damage Commission to retreat from this determination.

C. A.

1956

Paddington Borough Council v. War Damage Commission.

Associated London Properties Ltd. v. Paddington Borough Council.

"14. We therefore decided that the compensation payable to "the claimants by the acquiring authority should be assessed on "the basis laid down in section 53 of the Act of 1947.

"15. In interpreting the words 'had been made good' in "subsection (1) (*a*) of section 53 of the Act of 1947 we decided "to follow a previous decision of this tribunal in the case of "*Stone* v. *Sheffield Corporation*,[3] and we held that 'making "'good' involved an identical reinstatement of the demolished "building.

"The question for the decision of the Court of Appeal is "whether on the above findings of facts we were correct in law."

Harold B. Williams Q.C. and *G. D. Squibb Q.C.* for Paddington Borough Council. The first question on the council's appeal is whether or not the compensation payable to Associated London Properties Ltd. in respect of the compulsory purchase of their property in Porchester Terrace should be assessed in accordance with the provisions of section 53 of the Town and Country Planning Act, 1947. The council's contention is that section 53 does not apply. A payment of cost of works was not the appropriate payment to be made in respect of this property. It appears from the decision of Vaisey J. in *In re 56, Denton Road, Twickenham*[4] that the form Val. 4 was not a formal determination. The war damage involved a total loss. Section 7 of the War Damage Act, 1943, provides that the payment to be made in respect of war damage to a development hereditament shall be a payment of cost of works unless the damage involves total loss. "The appropriate payment" in section 53 cannot refer to the power conferred on the War Damage Commission to make a payment of cost of works in a case where another kind of payment is appropriate under the Act. Section 53 of the Act of 1947 is related to section 7 of the Act of 1943. The power to make a payment of cost of works conferred by section 20 (3) (*b*) of the Act of 1943 does not arise until the war damage has been made good. Even if in the circumstances as between the commission and Associated London Properties Ltd. the commission is estopped from denying that it is bound to make a payment of cost of works, that estoppel does not affect the council. The fact that the Treasury may give directions as to the kind of payment to be made, which the commission is bound to obey, does not make a payment made in accordance with that direction the appropriate payment under the Act of 1943 for the purposes of section 53 of the Act of 1947. The direction does not alter what is appropriate, it merely alters what a claimant gets.

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[3] (1954) 4 P. & C.R. 426; 104 L.J. 684.

[4] [1953] Ch. 51; [1952] 2 T.L.R. 676; sub nom. *Re War Damage Act, 1943; Re 56, Denton Road, Twickenham* [1952] 2 All E.R. 99.

Denys Buckley and *N. Browne-Wilkinson* for the War Damage Commission. It makes no difference to the commission who wins this appeal. What the commission is concerned to establish is that it has the power to decide before the time for payment arises that it will make a payment of cost of works. Unless the commission can tell a landowner that he will get a payment of cost of works, he cannot make up his mind whether he will repair or rebuild the premises nor can he sell the premises, since he will not know if the purchaser will get a payment of cost of works or not. If a value payment is made, a purchaser would get nothing. It is important, as a practical matter, that the commission should be able to come to a binding decision. A payment of cost of works is never made until the work is done. The Act of 1943 contemplates a determination before payment.

Arthur Capewell Q.C., *J. Ramsay Willis Q.C.* and *David Widdicombe* for Associated London Properties Ltd. The argument for the War Damage Commission is adopted. The date of determination of the kind of payment to be made and the date of its payment are different. For the purposes of section 20 (4) of the Act of 1943 the determination must be made in advance. Section 53 of the Act of 1947 is intended to meet those cases where the war damage has not been made good and therefore no payment of cost of works could have been made. The date of determination is the material date for the purposes of the section. The court is asked to say that, on the evidence, Val. 4 was a binding determination by the commission. Val. 8, which was served after the notice to treat, was not another determination. This is a question of fact. Section 53 applies where there is a compulsory purchase after a determination has been made to make a payment of cost of works, and compensation must be paid on the assumption that the property has been rebuilt. Section 53 only applies where the work of rebuilding has not been done: *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council.*[5]

Turning to the second appeal, that of Associated London Properties Ltd., the question is whether the compensation is to be assessed on the basis that a modern building had been rebuilt in accordance with the plans approved by the commission or whether it must be assessed on the basis that the original building must be deemed to have been reinstated. Section 53 is referring to making good under the Act of 1943, which provides how the payment of cost of works is to be calculated: *Stone* v. *Sheffield Corporation.*[6] "Make good" is not equivalent to reinstate: *Central Land Board* v. *Saxone Shoe Co. Ltd.*[7] There is no difficulty in making the calculation in this case, since the payment of cost of works had been calculated on actual plans. The meaning of "making good" was considered in the *East End Dwellings* case.[8]

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[5] [1952] A.C. 109; [1951] 2 T.L.R. 485; [1951] 2 All E.R. 587.

G. D. Squibb Q.C. in reply on the second appeal. Assuming that section 53 applies to this case, it is submitted that there is nothing in that section to give to the words "made good" the same meaning as that which they bear in the Act of 1943. The Acts of 1943 and 1947 deal with different subject-matters. "Making good" in section 53 means reinstatement. If this is not the correct basis of valuation, the task of any valuer becomes impossible. He cannot know what additions or alterations might have been made to the building if it is not to be deemed to be reinstated in its original form. Section 53 ought to be construed as providing a definite yardstick to be used in all cases. The interpretation of the section should not depend on any agreement with the War Damage Commission.

Arthur Capewell Q.C. in reply. The observations of Lord Reid in the *East End Dwellings* case[9] show that "made good" does not mean exact reinstatement.

Cur. adv. vult.

October 29. LORD EVERSHED M.R. The proceedings which are now before the court, with their long and somewhat complicated title, raise two short and distinct points of construction under section 53 (1) of the Town and Country Planning Act, 1947. In form both questions seek a review of a decision of the Lands Tribunal upon a case stated for this court dated July 5, 1956. The parties before us are: (1) the Paddington Borough Council, (2) Associated London Properties Ltd., and (3) The War Damage Commission; and their respective interests in the two questions will appear as I proceed with my judgment.

The first question asks whether, in the events which have happened, as they relate to certain property in London known as Irvine Court, Porchester Terrace (which was the subject of heavy war damage during the years 1942 to 1944), section 53 (1) has any present application. The Lands Tribunal held that it has, and upon this question the Paddington Borough Council are appellants and the substantial respondents to this appeal are Associated London Properties Ltd., the owners of the property until it was compulsorily acquired by the Paddington Council. The War Damage Commission are also respondents to this appeal and some arguments have been addressed to the court on their behalf by Mr. Buckley.

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[6] 4 P. & C.R. 426.

[7] [1955] 3 W.L.R. 614; [1955] 3 All E.R. 415.

[8] [1952] A.C. 109.

[9] Ibid. 130.

Upon the second question, which arises if we should be against the Paddington Council on the first, Associated London Properties are in the rôle of appellants. The question turns upon the meaning of four simple words in section 53 (1) (*a*), namely, "had been made good," which the Lands Tribunal, expressly following previous decisions of their own, interpreted as equivalent to "had been reinstated," that is, so as to put the building into the condition which it formerly had before the damage. Upon this matter the Paddington Council are in the position of respondents and the War Damage Commission have no concern with it.

In *Associated London Properties Ltd.* v. *War Damage Commission, Paddington Borough Council and Church Commissioners for England*,[1] which came before this court on June 16, 1954, on appeal from the Chancery Division of the High Court, the question was one of the propriety of the court making certain declarations in relation to the same subject-matter, before the issues involved had been before the Lands Tribunal. We were of opinion that, in the circumstances, the declarations sought by the then plaintiffs, Associated London Properties Ltd., ought not to be made, since they would either be bruta fulmina or must embarrass, if not usurp the statutory function of, the Lands Tribunal. In the course of my judgment in the former case, however, I did indicate a view on the question now before us (which was not then directly raised) adverse to the Paddington council. I have, I hope, attended to the arguments on the present appeal with an open mind; but, having heard them, I confess that my previous impression has been confirmed. I think, in other words, that the Lands Tribunal were right and that the appeal on this question fails.

The relevant words in section 53 (1) are as follows: "Where an interest in land the value of which is to be ascertained in accordance with the provisions of section 51 of this

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[1] Judgments of the Court of Appeal, 1954, No. 199A.

"Act is an interest in a hereditament . . . which has sustained "war damage, and any of that damage has not been made good "at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943 would, apart from "the compulsory purchase or apart from any direction given by "the Treasury under paragraph (*b*) of subsection (2) of section "20 of that Act, be a payment of cost of works—(a) the value "of the interest for the purposes of the compensation payable ". . . shall," etc.

The date of the notice to treat in this case was May 9, 1950, and it has been agreed that that is the relevant date to which we must direct our minds. I therefore can pose the question by reference to that date as follows: "On May 9, 1950, what "would, apart from the compulsory purchase order (which had "in fact been made in 1946) and its consequences, have been "the appropriate payment in respect of this hereditament?" On the face of the document called Val. 4 (a form issued by the War Damage Commission in 1945) it had been stated in plain terms to Associated London Properties that the payment the War Damage Commission would make would be a cost of works payment; but, on the face of the document, the reason assigned for this conclusion was that the damage had not resulted in a total loss. This statement by the War Damage Commission was in all relevant respects confirmed by a later document called Val. 8; but as that was not issued until after May 9, 1950, I leave it out of account. It is, however, quite clear and admitted on all hands that, in fact, these premises suffered a total loss with the necessary result that according to section 7 of the War Damage Act, 1943, and, on the assumption that that section stood alone, the appropriate payment would undoubtedly be, or have been, a value payment. For practical purposes a cost of works payment is greater than a value payment in otherwise comparable circumstances. But the question what payment is appropriate to be made is not, in my judgment, solely dependent on section 7. The War Damage Act, 1943, contains certain provisions, the short effect of which is to vary the prima facie effect of section 7 pursuant to directions which it was contemplated would be given by the Treasury with a view to the public interest on such matters as housing, the shortage of building material, and matters of that kind. There is, indeed, a reference in section 53 (1) to the case where the prima facie result would have been a cost of works payment, but a value payment becomes, in fact, the appropriate payment, since it is against the public interest under the contemplated Treasury direction that the damaged premises should be restored at all. That is the reference which I read, "apart from any direction "given by the Treasury under paragraph (*b*) of subsection (2) "of section 20 of that Act." I would observe that that provision, incidentally, is obviously one, having regard to the comparative amount of cost of works and value payments, favourable to the private owner. We are concerned, however, with the converse case; that is, where there has been a total loss and where therefore prima facie, under section 7 of the Act, a value payment would be the appropriate payment.

The case with which we are concerned has arisen by an application, or what was intended undoubtedly to be an application, of section 20 (3) of the War Damage Act, 1943. The first subsection empowers the Treasury to give directions to be observed by the commission. Then subsection (3), so far as relevant, is as follows: "For the purposes of giving effect to any such directions, "the commission shall have power, . . . (*b*) where war damage "in respect of which a value payment would otherwise be appro- "priate is made good in the public interest, to make in respect "thereof a payment of cost of works," etc.

I will turn to the facts of this case. I shall deal with them briefly. It is abundantly made clear that this was a case in which the War Damage Commission would, apart from the compulsory purchase, have made a payment of cost of works pursuant to their statutory powers following the Treasury direction under section 20 (3) (*b*) of the Act. The Treasury direction was in fact issued in October, 1943. The War Damage Commission informed Associated London Properties of that direction and what effect they proposed to give to it, at the same time explaining how it came about that the form Val. 4, though indicating the propriety of a payment of cost of works, based it on the erroneous premise that this was not a case of total loss. It is further clear that Associated London Properties acted upon the basis of what the War Damage Commission had told them; particularly, they proceeded to the expense of having proper plans prepared for the making good of the damage and of submitting them for acceptance to the War Damage Commission. It is true that all these matters of fact came into existence before the notice to treat and before the Paddington Council were therefore directly concerned in the property at all; but the council were informed in fact of the whole story very soon after the date of the notice to treat. In any case, it may be said

C. A.

1956

PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. v. PADDINGTON BOROUGH COUNCIL.

Lord Evershed M.R.

that for some purposes at least their position cannot be better than that of a successor in title to Associated London Properties.

In the circumstances I shall confine myself to reading two passages from the case stated. The first is in paragraph 11 where the tribunal observe: "We also came to the conclusion "that it was clear from the correspondence and actions of the "War Damage Commission that what the War Damage Commis-"sion intended to convey in this document"—namely, Val. 4—"was that although the hereditament suffered total loss, the "payment was to be a cost of works payment by virtue of the "said Treasury direction."

Then in paragraph 13: "From the evidence which was "adduced before us we have no doubt that the War Damage "Commission intended to treat the said property on the footing "of what is known as a cost of works payment, and the evidence "further confirmed us in the opinion that it was never the inten-"tion of the War Damage Commission to retreat from this "determination." In my judgment those conclusions of the tribunal are fully and amply confirmed and justified by the facts as we now know them to be.

In that state of affairs, what is the answer to the question I have earlier posed? As a matter of common sense I must say that I feel in my mind no doubt at all that the right answer is that the appropriate payment at the relevant date, in the light of all that had occurred, would have been a payment of cost of works. That is what the War Damage Commission had said; they had said it pursuant to a Treasury direction, and they had allowed Associated London Properties, the owners, to act upon what they had been told to their own detriment. The same conclusion would, I think, be plainly in accordance with justice. For at the date of the notice to treat the situation of the owners, Associated London Properties, was that they entertained these negotiations with the War Damage Commission and, in collaboration with the commission, had caused to be prepared plans for the reconstruction and had submitted them for acceptance—and, indeed, the plan had been virtually accepted by the War Damage Commission. I have already referred to the circumstances that the reference in section 53 (1) (*a*) to the Treasury direction, though it is not a reference to the Treasury direction with which we are concerned, indicates that the section was intended not to be unfavourable to the property owner. If I am right in my view of the common sense and of the justice of the case, then, in my judgment, the answer as a matter of construction ought to be in line with justice and common sense, unless the language of the statute prohibits such a conclusion. In my judgment, it does not prohibit such a conclusion.

The argument for the Paddington Council, in the last analysis, rests, as Mr. Williams put it, upon the view that the question, which type of payment, cost of works or value, would be appropriate within the meaning of section 53 (1) depends upon what he called the statutory test to be found, and found exclusively, in section 7 of the Act of 1943. I do not take that view. It seems to me that if Parliament had intended that the matter should be determined by reference only to section 7, it would have been perfectly simple so to have stated. So far from doing so, Parliament has, by the express interpretation of one reference to section 20 of the War Damage Act, 1943, indicated that section 7 is not the only matter to which reference must be made. It is, of course, true that, in one sense of the term, a payment of cost of works was not appropriate in this case, because the work had not been done; but that is true in every case where a payment of cost of works has to be made. It is never made until the work is done.

But reliance was placed, naturally enough, upon the exact language of paragraph (*b*) of subsection (3) of section 20 of the War Damage Act, 1943: "where war damage in respect of "which a value payment would otherwise be appropriate is made "good," then—and great stress is laid upon this—but not before then, does the power arise to make a cost of works payment. My first answer to that point is that it is strictly true of all cases of works payments, that they never are proper to be made until the damage has been made good, until the work has been done. But I rely also upon the words "would otherwise be appropriate," which indicate that at, and immediately before, the time of the making good, when the cost of works payment would fall to be made, some other payment, namely, a value payment, would otherwise be appropriate. Put the other way round, the argument for the Paddington Council would be a great deal stronger if subsection (*b*) had read: "Where war damage in respect of which "a value payment *is* appropriate is made good." I think that the language chosen shows that the appropriateness is to be determined not by reference exclusively to the question whether or not the damage in fact has been made good at the time to which you have to direct your attention.

I have already made the point that section 53 (1), by its reference to section 20 (2) (*b*), shows that the test which

C. A.
1956

PADDINGTON BOROUGH COUNCIL
v.
WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD.
v.
PADDINGTON BOROUGH COUNCIL.

Lord Evershed M.R.

section 53 requires to be made is not one exclusively referable to section 7, but must have taken into account the ordinary practical, common sense, effect in particular cases of Treasury directions. I add to that consideration this: there can be no doubt at all, as Mr. Buckley pointed out to us, that the War Damage Act, 1943, contemplated that the commission would make determinations upon which the parties concerned would act and alter their position before the actual moment arose when one form of payment or another fell to be made. I need not take time by referring to all the sections to which Mr. Buckley alluded, but I give one example which he took from section 14. That is the section which deals with payment made where partially damaged land is compulsorily acquired, and so far as relevant reads: "Where the appropriate payment in respect of "war damage to a hereditament would apart from this provision "be a payment of cost of works, if land constituting or forming "part of the hereditament . . . is acquired compulsorily . . . "then, notwithstanding any previous determination of the kind "of payment to be made in respect of the damage to the "hereditament," certain consequences will follow. I think it is plain to demonstration that the War Damage Act, 1943, and its provisions for making war damage payments, would not in practice be workable unless, at some stage previously to the actual date when payment can be called for, an effective determination has been made by the War Damage Commission. That assumption underlies section 53 (1), and on the facts of this case, when regard is had to the Treasury direction and all the other matters to which I have referred, I can come to no other conclusion than that the payment which the War Damage Commission would properly have made, that is to say, the payment which would have been the appropriate payment, had it not been for the compulsory acquisition, would have been a payment of cost of works. For those reasons I am of the opinion that the Lands Tribunal were right upon this matter, and I would dismiss this appeal.

The result is that it is necessary for me now to proceed to a conclusion upon the second question. I did not, in my reference to section 53 (1), go on to read the relevant words. Paragraph (*a*), which follows upon the terms which I have already quoted, is as follows: "the value of the interest for the "purposes of the compensation payable in respect of the com-"pulsory purchase shall . . . be taken to be the value which it "would have if the whole of the damage had been made good "before the date of the notice to treat."

The facts of this case are of a somewhat special kind. It appears that the former edifice upon 37 Porchester Terrace had been erected in a style which deferred to the so-called Victorian preference for all kinds of embellishment, a style which is now aesthetically regarded as outmoded; and, accordingly, negotiations by correspondence took place between the War Damage Commission and the then owners, Associated London Properties, with a view to substituting in the new building a small reduction in content and also a style which would be considerably simpler and would therefore be appreciably less costly but, having regard to changed tastes and so forth, would nevertheless in the result have a greater value in the market. So much is clearly demonstrated by a short reference to two of the letters. Sir Thomas Bennett, who was acting as architect for the owners, wrote on June 13, 1945, to the regional technical adviser of the War Damage Commission: "We confirm Mr. Bennett's interview . . . "in which the following arrangement was accepted for the "rebuilding of Irvine Court, Paddington: 1. The War Damage "Commission has issued a cost of works authority"—and the number is given—"dated May 4, 1945"—that is, in fact, a reference to Val. 4 even though the effect of it is perhaps somewhat euphemistically stated. "2. The buildings which were "damaged have been accepted equal to post-1914 buildings." The writer then states of what the original building consisted and says: "The estimated cost given by Messrs. Gardiner & "Theobald for rebuilding"—that is, restoring this former edifice —"on a cost of works basis on 1939 prices is £56,300. The new "building will consist of" and he states of what it will consist and that is estimated to cost £49,000. "We confirm that you "have accepted rebuilding on the lines indicated in" the paragraph which I have just read, "as the most economical method "of replacing the destroyed property." So I observe the saving is in fact £7,300.

The regional manager, in his reply of December 5, clearly accepted that view: "Your proposals for the rebuilding of the "above property have now been considered, and it is agreed that "the scheme set out in the details provided by Messrs. Gardiner "& Theobald can be accepted as making good with alterations "and additions." That last formula is an oblique reference to section 8 of the War Damage Act, 1943. "It is further con- "sidered that the cost of rebuilding the blocks of flats in modern "construction and design on the site . . . in accordance with "the drawings," etc., "would be within the permissible amount,

C. A.
1956

PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. v. PADDINGTON BOROUGH COUNCIL.

Lord Evershed M.R.

"and the Commission will in due course be prepared to consider "detailed proposals." Then they say that, in view of the size of the contract, the rebuilding should be put out to competitive tender.

The result of those letters, which were subsequently acted upon, makes it quite plain that at the relevant date the payment that would have been made, the payment that was proper to make and was appropriate to be made, was the sum of £49,000, being the sum which would have been paid, at price levels of 1939, for the making good of the damage, not by way of exact restoration of the Victorian building, but by way of substituting a modern, more economical building. But the significant feature of the case is that such a modern building in the market, though it costs less, would be worth a great deal more than the building it would have replaced, the former edifice. The issue between the parties is this: Is the value which, under section 53 (1) (*a*), Associated London Properties is now entitled to receive from the Paddington Council the present market value, ascertained in accordance with the Act, that this building would have had if the damage had been made good in accordance with the proposals in the letter which I have read?

Making good the damage in a way which modifies the original design is within the terms and contemplation of section 8 of the War Damage Act, 1943. Subsection (2) of that section reads as follows: "If the war damage is made good by reinstating the "hereditament in the form in which it existed immediately "before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works "executed for the making good thereof; provided"—and this proviso has in this case come into play—"that if the reinstatement of any part of the hereditament could have been omitted "without detracting from the value of the hereditament, or the "omission thereof would have increased its value, the amount "of the payment shall be reduced to what it would have been "if that part had not been reinstated." There is then a definition of the words "permissible amount" which I need not in the circumstances read, but which will recall what was stated in the regional manager's letter. If the matter had stood there alone it would, to my mind, have not been open to reasonable doubt that in this case the formula in paragraph (*a*) of section 53 (2) of the Act of 1947, "if the war damage had been made "good," would mean "had been made good in the way that "was agreed by the omission of certain of the former embellish-"ments, etc."; but the matter does not rest solely upon subsection (2) of section 8. Subsection (3) of the same section goes on to provide: "If the war damage is made good by works which "include alterations or additions to the hereditament, the amount "of the payment shall be an amount equal to so much of the "proper cost of the works executed for the making good of the "damage as falls within the permissible amount." The effect of that subsection is that it comprehends the case where the owner desires, when rebuilding, to add considerable additions to what was there before; for example, if he proposes instead of a building of three storeys to build a new one of five or six. In such a case the obligations of the War Damage Commission do not include payment to him in respect of these additions which he may wish to make on his own initiative. In other words, the obligation of the War Damage Commission is limited, to put it simply, to so much of the new building as, so to say, represents the old building. But the effect of subsection (3) is to create this difficulty; that by this language the phrase "made good" clearly in the context includes the building of something additional, and substantially additional, to what was there before. I agree with Mr. Squibb that the words "had been made good" are not technical terms, and they are nowhere defined as technical terms in the Act of 1947. On the other hand, section 53 (1) was obviously drawn by reference to the War Damage Act, 1943, because that Act was expressly referred to in the subsection and Parliament must therefore be taken, in framing this subsection, to have had in mind the provision as to making good, inter alia, in section 8 of the Act of 1943.

In my judgment, it would be quite impossible and manifestly an unjust conclusion to suggest that in a case in which before the compulsory purchase, before the notice to treat, an owner had intended to make good by erecting a palace on what had formerly been a relatively small house, the value which the acquiring authority had to pay would cover the value of the palace which would have been erected. If I am so far right—and I reject that possible construction without more as being plainly unacceptable—are you therefore forced back to construe the words "had been made good" as equivalent to "had been "reinstated," that is, put back in the form which the building formerly had? For myself, I should be against such a conclusion, unless I were compelled by the terms of the Act to that view. As a matter of common sense it seems to me that the making good to which section 53 (1) refers is the making good for which the payment of cost of works ex hypothesi would have been made. That, I think, follows from the form of the subsection itself which, as it seems to me as a matter of common sense, should mean that the making good of the damage means the doing of the works for which the cost of works payment would have been properly, that is, appropriately, made. The justice of the case demands the same conclusion. Had it not been for the compulsory acquisition, the owners, Associated London Properties Ltd., were in a position to say on the facts: "We "should have got from the War Damage Commission a payment "related to a particular reconstruction which had been agreed. "We would have then got a property having a particular value. "Now the Paddington Council has quite properly acquired com-"pulsorily our property, and prima facie we should be compen-"sated for that which we have lost. Why should we take from "them a sum based upon the supposition that there would have "been built on this land something which everybody agrees "would never have been built, and which would have been, "under modern conditions, something in the nature of a white "elephant?"

Am I, therefore, again compelled to fall back upon the alternative construction that "made good" is equivalent to "reinstated"? I have come to the conclusion that I am not. I first rely upon, and derive some little support from, the language used by the noble Lords in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council.*[2] In that case the same subsection and the same words were under review by the House, but the question, it is right to make clear, was of a quite different kind. The question there was of this nature: there had been destruction by enemy action of a building which formerly had been let in flats to what are known as rent restricted tenants. The former owners and the War Damage Commission had agreed that this was a case of payment of cost of works, and, apart from the compulsory acquisition by the Finsbury Borough Council, there would have been reinstated on the site a new building of the same character and, I assume, in the same form as the old building. It was the claim of the Finsbury Borough Council that the flats of which the new building when erected (if it had been erected) would have consisted, would have been rent controlled flats, with the result that the value of the building in the hands of the owners would be proportionately reduced. On the other side it was said: No; the new building would have been a new building, the identity of the old rent restricted flats would have been lost and, therefore, the new building (if erected) would have been free from rent control with a consequent substantial enhancement of the value of the property. The House of Lords was of the opinion that the contention of East End Dwellings Co. Ltd. was correct, and they based their conclusion mainly upon the view they took of the words which we have now to consider, though we have to consider them, as I quite agree, for a different purpose and in another context. But the argument for the Finsbury Borough Council, which all the noble Lords rejected, clearly amounted to this, that the phrase "if the "damage had been made good" must be treated as an equivalent to "if the damage had never occurred"; for it would only be on that hypothesis that the flats in the new building would have remained subject to the Rent Acts. Thus, to take an example, Lord Porter in the leading speech said[3]: "If what had been "intended was to give the owner the value of his property as it "existed before the war damage was done, the intention would "have been easy to express by substituting the words 'the value "'which the interest would have had if the damage had not "'been done' for the words of the Act, viz., 'the value which it "'would have if the whole of the damage had been made good.'"

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[2] [1952] A.C. 109; [1951] 2 T.L.R. 486; [1951] 2 All E.R. 587.

To the same effect was the language of Lord Morton and Lord Reid. It was put with characteristic lucidity by Lord Asquith of Bishopstone in the same way, when he said[4]: "If you are "bidden to treat an imaginary state of affairs as real, you must "surely, unless prohibited from doing so, also imagine as real "the consequences and incidents which, if the putative state of "affairs had in fact existed, must inevitably have flowed from or "accompanied it," and then, a little later on: "As some of my "noble and learned friends have pointed out, if Parliament had "intended the meaning contended for by the respondents, nothing "would have been easier than to provide that the value should "be assessed as if no war damage had occurred."

The argument of the Paddington Council in the present case, in effect, is that the words which we are now called upon to construe should be read as equivalent for present purposes to "as if the war damage had not occurred"; that is to say, by limiting "had been made good" to a form of reinstatement which again brought into being the exact building that had been there before the war damage occurred. It seems to me that, although the point here is a different one, it would not be right for this court for another purpose and in another context to say that those words did mean the very thing which the House of Lords in the *East End Dwellings* case[5] said they did not. I have, therefore, come to the conclusion that the words "had been "made good" are equivalent to "if the work had been done for "which, on the facts of the case as proved, the appropriate cost "of works payment would have been made."

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[3] [1952] A.C. 109, 122.

[4] Ibid. 132.

On the facts of this case there is no doubt what that making good would have been, for all the plans were prepared, and we know exactly how the reconstruction would have taken effect; and there is here no doubt whatever, as I understand, that the building, reconstructed in accordance with the modern plans, would have had a particular value. The value is as easy to ascertain as would be the value of a new building, an exact replica of the bombed former structure.

In arriving at that conclusion in the present case, however, I wish to make it quite clear also what I am not saying: in my judgment the prima facie effect of these words is in truth a reinstatement. That is prima facie the proper test and will apply in all cases, unless it is shown that, as a result of negotiations or whatever it may be, the proviso to subsection (2) has in fact operated, so that the thing that will be done is a specific type of rebuilding, and so that it may be said: had it not been for the compulsory acquisition this and no other would have been the work which would have been done and for which payment by way of costs of works of a specific amount would have been made. Any other view would seem to me to be highly speculative and visionary. It would be an impossible task, as the Lands Tribunal pointed out in their earlier cases, if in the absence of any such state of affairs as has been proved to have occurred here, an owner were to say: "Well, of course, we have not got very far "with it, but we have got out a series of alternative schemes. "All of these would result in very splendid modern buildings. "They would all have cost no more than the cost of restoration. "Any one of them might very well have been agreed with the "War Damage Commission and all of them would have had a "result that we had a building more valuable than we should "have had if exact reinstatement had been adopted." As was pointed out by the Lands Tribunal, it would be an impossible task for a valuer to decide among such alternatives which might have been the favoured conclusion, and what might have emerged or arisen upon the ashes of the old building, and what would have been its value.

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[5] [1952] A.C. 109.

My conclusion in this case by no means invalidates the conclusion of the Lands Tribunal in their earlier decisions, which they were expressly following here. In the present case, in my judgment, a very special state of facts emerges; for it has been proved beyond a peradventure that at the relevant date, that which would have happened by way of making good would have been a specific kind of definite reconstruction for which the proper cost of works payment would have been £x. I think, therefore, that Associated London Properties are entitled to say that the Paddington Council are bound to pay to them—the premise being found in Associated London Properties' favour—the value the building would have had if the damage had been made good. I think, therefore, on this point that the appeal succeeds.

BIRKETT L.J. I am of the same opinion. Two points emerge in this case and they have been stated quite clearly by my Lord. The first might possibly be put in this way: what is the appropriate amount of payment to be made by the War Damage Commission in the special circumstances of this case? The answer to that question, I think without doubt, is " a payment of " cost of works," and I do not think that it could be put better than it has been put in the case stated, in paragraph 13: " From " the evidence which was adduced before us we had no doubt " whatever that the War Damage Commission intended to treat " the said property on the footing of what is known as a cost of " works payment, and the evidence further confirmed us in the " opinion that it was never the intention of the War Damage " Commission to retreat from this determination."

In March of 1945—that is five years before the date of the notice to treat—the claimants produced plans of the property to the War Damage Commission and satisfied the War Damage Commission (as the correspondence and the documents prove) that the building was of that kind which fell within the class of case in respect of which the commission had been directed by the Treasury, under the provisions of section 20 (1) of the War Damage Act, 1943, to exercise the powers conferred upon them by subsection (3) (*b*) of that section. My Lord has referred to the Treasury direction, and my Lord has referred to the decision of the War Damage Commission. The question, therefore, does resolve itself, in my judgment, into the plain and simple question:

on May 9, 1950, in all the circumstances of this case and its history, what was the appropriate payment apart from this matter of the compulsory purchase by the local authority?

Of course, the issue has been just a little complicated by a somewhat unfortunate matter. That was that what was called document Val. 4 of May 4, 1945, had been sent to the claimants, and there it was stated that the war damage did not involve total loss as defined in the War Damage Act, 1943. As a matter of fact, the damage to the property had been such that the site had been cleared. Document Val. 4 goes on to say that the commission "can only pay a cost of works payment if the "damage is, in fact, made good," having previously said in that document " . . . the commission will in due course pay a claim "for the reasonable cost of making good the war damage to this "property (a cost of works payment) after the works have been "carried out." The Lands Tribunal were quite clearly of the opinion—and they set it out in their careful case stated—that that had been a mistake on the part of the War Damage Commission, which they had done their utmost to put right and which had not really misled anybody at all. Without troubling further about this matter, I think on the first point I can say that I, equally with the Lands Tribunal, entertain no manner of doubt at all that the answer to the question: what, on May 9, 1950, would have been the appropriate payment under the War Damage Act apart from the compulsory purchase? is clearly "a "payment of cost of works."

The second point that was raised in the case, namely, that being so, what is the payment which is to be made under it, did raise many more difficulties. I quite sympathize with the argument of Mr. Squibb that, after all, this case had to be decided upon the decision of the Lands Tribunal about identical reinstatement and the proper interpretation of the words "had been made "good," but Mr. Squibb said that what this court ought to do is to keep in mind, not merely the case with which we are now dealing, but also the effect upon all sorts of other cases which may arise in the future, and that it was a safe and salutary and wise thing to have what he called a fixed yardstick for assessing the moneys to be paid and, therefore, it was safe to hold fast to the rather rigid view that it was to be identical reinstatement and was not to permit all sorts of additions, variations and alterations because, he said, in that way uncertainties would be bound to arise. As I say, one has very considerable sympathy for him in that argument, but, in my view, on this second point the decision which has been announced by my Lord is in accordance with the very special facts of this case, it is in accordance, as I think, with a proper interpretation of the statutes in this case, and, most important of all, it is most just and equitable.

My Lord has referred (and I need not read them again) to the letters which passed on this matter with the War Damage Commission, notably the letter of June 13 where actual figures were given showing a saving of £7,300 by omissions, and the answer of the War Damage Commission "It can be accepted "as making good with alterations and additions" and "it "would be within the permissible amount." I regard those two letters as of very great importance on the special facts of this case. Here it is quite clear that the omissions amounting to so large a sum were the subject of special agreement.

With regard to the interpretation of the words "made good" in section 53 (1) (*a*), "the value of the interest for the purposes "of the compensation payable in respect of the compulsory pur"chase shall, subject to the provisions of this section, be taken to "be the value which it would have if the whole of the damage had "been made good before the date of the notice to treat," as my Lord has already pointed out, in no case in practice is the payment made until the damage has been made good (which is necessarily at some very considerable distance of time after the determination), but the practice is that the plans are submitted and agreement is come to and then the work is done and ultimately the payment is made. In this case the payment that would have been made had there been no intervention by the local authority would have been the figure, which was the agreed figure in the letters which my Lord read, namely, £49,000. That clearly was a making good, but that will not quite fit the submission Mr. Squibb made. It is not an identical reinstatement of the old Victorian building. It was felt that in these modern days it was not desirable or necessary to reproduce those features, and the plans which had been submitted were for this more modern building, more in accord with modern conditions and, indeed, making a much more efficient and a much more valuable building, and making a saving of some £7,300 in building it.

So far as section 8 (2) of the Act of 1943 is concerned, that reads: "If the war damage is made good by reinstating the "hereditament in the form in which it existed immediately before "the occurrence of the damage, the amount of the payment "shall be an amount equal to the proper cost of the works "executed for the making good thereof," and then there is the important proviso: "if the reinstatement of any part of the "hereditament could have been omitted without detracting from "the value of the hereditament, or the omission thereof would "have increased its value, the amount of the payment shall be "reduced to what it would have been if that part had not been "reinstated." Then, as my Lord pointed out, subsection (3) goes on to deal with alterations or additions to the hereditament. I think myself that here there was a making good for which a payment of cost of works, which had been agreed with the War Damage Commission, would have been the appropriate payment, and that if the work had been done, on the special facts of this case as we now know them, then that appropriate cost of works payment would have been made. I think it is important to observe that in this case there are, indeed, special facts and those special facts must be considered. There is here a specific reinstatement with the omissions which have been agreed between the claimants and the War Damage Commission, and I think, for my own part, that is the basis upon which the compensation should be assessed.

I agree with the judgment that has been delivered for the reasons given by my Lord.

ROMER L.J. I quite agree, and there is not very much I desire to add for myself.

As between the War Damage Commission and Associated London Properties Ltd., there can be no question but that the commission had determined, previously to the Paddington Borough Council's notice to treat, that the appropriate payment to be made in respect of the war damage to Irvine Court was a cost of works payment. This was found, as a fact, in paragraph 13 of the case stated, and is manifest from the evidence as a whole. See especially the letter of April 16, 1953.

The ground of the commission's determination was wrongly stated in Val. 4 and Val. 8 and it was there based, as it ordinarily would be based, on the view that the war damage did not involve a total loss. In fact there had undoubtedly been a total loss and the true ground of the commission's determination was the application to the property of the relevant Treasury direction under section 20 (3) (*b*) of the Act of 1943. But the misstatement by the commission, which has been fully and long since cleared up, as to the ground of the determination is of no great importance, if the determination had in fact been validly arrived at. As to this, the Paddington Borough Council contend that section 20 (3) (*b*) does not apply except in cases where war damage has been made good, and, as the damage had not been made good in the present case, the commission could not validly determine to make a payment of cost of works under that subsection. I cannot accept that suggestion. It seems to me that it is implicit in the subsection itself, and is apparent also from sections 13 and 14 of the Act, that the War Damage Commission has the right to determine that a case is one for a cost of works payment even though none of the work of repair has been done. As the commission did so in the present case, that became, and was at the date of the notice to treat, the appropriate payment for the purpose of section 53 of the Act of 1947, and I am accordingly in agreement with the decision at which the Lands Tribunal arrived on the first appeal.

The question raised in the second appeal seems to me to be a more difficult one. One form of "making good" which is visualized by section 8 (2) of the Act of 1943 is by reinstatement of a hereditament in the form in which it existed immediately before the occurrence of the damage, but excepting any part whereof the reinstatement could be "omitted without detracting "from the value of the hereditament, or the omission thereof "would have increased its value." In the present case certain omissions were made in the plans, because they would result in the hereditament being more valuable than would have been the case had the premises been restored exactly to their previous form. The War Damage Commission agreed that the work should be done in accordance with the plans, which is not surprising, inasmuch as that form of reinstatement would be considerably cheaper than the precise restoration of the building to its previous condition. The question is whether a making good in accordance with the plans can be regarded as a "making "good" in the sense in which the phrase is used in section 53 of the Act of 1947, or whether an identical reinstatement of a building in its original form and nothing else is envisaged by the section.

Mr. Squibb put the submission on behalf of his clients, I thought, in an attractive way when he said that the task of a valuer, who has to make the requisite valuation for the purposes of section 53, is not a difficult one if all that he has to do is to imagine the precise restoration of the building which has been damaged. The plans of the building would be available to him and he would merely exercise his professional experience with

C. A.
1956

PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. v. PADDINGTON BOROUGH COUNCIL.

Romer L.J.

regard to the value of a hereditament which was built up in exact accord with its original condition. It would, however, be a matter of difficulty, if not impossibility, for him to be asked to allow his imagination to range over a large number of suggested alterations and additions to the building resulting in what might be, in effect, a different kind of building altogether. Accordingly, when you find, as Mr. Squibb said you do find in section 8 of the Act, that the phrase "made good" is used in two different senses, viz., restoration alone and restoration with additions and alterations, and the court has to choose which sense to attribute to the phrase in section 53 of the 1947 Act, the relative ease of the surveyor's function, to which I have referred, if the building is restored to its exact form, contrasted with the difficulties which he would have if the second suggestion was adopted, affords the key to the sense in which the phrase is used in section 53; and, accordingly, we should hold that where the phrase is used in section 53 it means precise restoration, as distinct from restoration with alterations and additions.

As I say, I think that way of putting it is an attractive presentation of the position, and for my part I would hesitate long to hold that an intended reinstatement with omissions, which had not been approved by the War Damage Commission, or a reinstatement of the kind contemplated by section 8 (3) of the Act, namely, reinstatement with alterations and additions, would constitute a "making good" for the purpose of section 53 of the 1947 Act. It seems to me that in either of these cases the only relevant consideration would be the value which the hereditament would have had at the date of the notice to treat, if it had been restored exactly to its previous form. I think on the whole, however, that it would be carrying the argument too far to say that a proposed reinstatement involving omissions with which the War Damage Commission have expressly agreed departed from a "making good" within the meaning of section 53. Such a rigidity of treatment of the relevant language of the section is tantamount to saying that it means, in effect, and in all cases, the value which the hereditament would have if none of the damage had occurred, a view which was not found acceptable by the House of Lords in the *East End Dwellings* case.[6]

Accordingly, though in my judgment Mr. Squibb's approach to section 53 is the right one in general, it should not be adopted in the present case, which I should imagine is an exceptional one; and I prefer the view that in this case the value of Irvine

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[6] [1952] A.C. 109.

C. A.

1956

PADDINGTON BOROUGH COUNCIL *v.* WAR DAMAGE COMMISSION.

ASSOCIATED LONDON PROPERTIES LTD. *v.* PADDINGTON BOROUGH COUNCIL.

Court should be assessed by reference to what it would have been worth had it been reinstated in accordance with the approved plans. I accordingly agree that the first appeal should be dismissed and the second appeal should be allowed.

Paddington Borough Council's appeal dismissed with costs; Associated London Properties' appeal allowed with costs; leave to Appeal to the House of Lords granted to Paddington Borough Council in respect of Associated London Properties' appeal.

Solicitors: *W. H. Bentley, Town Clerk, Paddington; Leslie Nathanson & Co.; Treasury Solicitor.*

B. A. B.

PERCY E. CADLE & CO. LTD. *v.* JACMARCH PROPERTIES LTD.

[Matter No. M. 940.]

C. A.

1956
Dec. 6.

Denning and Hodson L.JJ.; Ormerod J.

Landlord and Tenant—Act of 1954—*Business premises* (*Security of tenure*) — *Landlord's intention to reconstruct* — "*Reconstruct*" — *Proof of intention to change identity of business premises—Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

A property company purchased business premises consisting of shops on two floors and a storage basement connected only by outside steps. They at once served notice to terminate the tenancy of the tenant who occupied the ground floor shops and basement. The notice stated that the landlords would oppose the grant of a new tenancy under the Landlord and Tenant Act, 1954,[1] on the ground specified in section 30 (1) (*f*), namely, that they intended to reconstruct the premises comprised in the holding or a substantial part thereof.

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[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which "a landlord may oppose an application under subsection (1) of section "twenty-four of this Act are such of "the following grounds as may be "stated in the landlord's notice under "section twenty-five of this Act or, "as the case may be, under subsection (6) of section twenty-six "thereof, that is to say:— . . . "(*f*) that on the termination of the "current tenancy the landlord intends "to demolish or reconstruct the "premises comprised in the holding "or a substantial part of those "premises or to carry out substantial "work of construction on the holding "or part thereof and that he could "not reasonably do so without obtaining possession of the holding; ". . ."

On the hearing of the tenant's application for a new tenancy the landlords proved that they intended to change the identity and character of the premises as a whole by converting the three floors into one self-contained shop unit, building inside stairs and carrying out other structural repairs and improvements on that part of the premises comprised in the tenant's holding. The county court judge held that the amount of work proposed fell short of reconstruction within paragraph (*f*) and granted a new tenancy to the tenant. On appeal by the landlords:—

Held, that there was evidence on which the county court judge could hold as he did, for the word "reconstruct" in paragraph (*f*) means a physical rebuilding following a measure of demolition of the premises comprised in the holding; and the landlords could not successfully rely on paragraph (*f*) merely by proof of an intention to change the identity or character of the premises by an amount of physical work which fell short of reconstruction of the particular holding in the physical sense intended by the Act.

APPEAL from Judge Rowe Harding, sitting at Pontypridd County Court.

By a lease, premises consisting of a basement and ground floor shops at 96, Taff Street, Pontypridd, Glamorgan, were let for 14 years from October 1, 1942, the lease being due to expire on October 1, 1956. On March 26, 1956, a property company, Jacmarch Properties Ltd., bought the whole of the premises at 96, Taff Street, including not only the basement and ground floor, which were occupied under the lease by the present applicants, Percy E. Cadle & Co. Ltd., but also the first floor, which was occupied by another tenant. Within two days of the conveyance to Jacmarch Properties Ltd. they gave notice to Cadle & Co. of termination of the tenancy under the Landlord and Tenant Act, 1954,[1] stating that the notice was to terminate the lease on October 1, 1956, and that the landlords would oppose any application for a new tenancy or any continuation of the existing tenancy on the ground specified in section 30 (1) (*f*) of the Act of 1954, namely, that they intended to "reconstruct the "premises comprised in the holding or a substantial part" of them, and that they "could not reasonably do so without "obtaining possession of the holding."

The holding of which the tenants, Percy E. Cadle & Co. Ltd., were in possession under the lease consisted on the ground floor of a front portion used as a tobacconist's shop and a back portion used as a men's hairdresser; to get down to the basement the tenants had to go outside the front door of the shop and down some steps into the basement, where there was a storeroom; but it was so damp and poorly situated that it was very little used. On the first floor of the premises was a ladies' hairdresser shop occupied by another tenant. In order to get to the ladies' hairdresser shop it was necessary to go outside and up a staircase belonging to the premises next door; the first floor was not part of the holding which was the subject of the lease.

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[1] See note 1 on p. 323.

At the hearing on August 28, 1956, of the tenants' application for a new lease under the Act the county court judge found that the new landlords had formed a firm and settled intention to modernize the building; that they intended to make the three floors into one self-contained unit; that they intended to put inner staircases from the ground floor shop down to the basement and from the ground floor shop up to the first floor; to put lavatories on the first floor with all the necessary plumbing; and to make the basement a much better place by putting in a proper floor and getting rid of the sources of the damp. They proposed to let the whole renovated premises to a multiple store at a substantial rent which would cover the cost of the improvements which they proposed to do—estimated by the county court judge at about £1,500.

The county court judge held that the proposed work did not amount to reconstruction of a substantial part of the premises, and accordingly that the landlords had not established their ground of opposition under section 30 (1) (*f*); and he granted the tenants a new tenancy of seven years from October 1, 1956, at a rent of £350 per annum. The landlords appealed.

Lionel Blundell for the landlords. The word "reconstruct" in paragraph (*f*) of section 30 (1) is apt to cover a case like the present where what is intended is structural alteration which will destroy the identity of the existing premises and merge them in a new entity. In such a case the quantum of the work involved and its estimated cost are not the primary considerations; and the county court judge erred in directing his attention solely to those factors and in holding that what was intended was not a reconstruction within paragraph (*f*). The legislature has already used the word "reconstructed" in section 12 (9) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to include the operation "by way of conversion"; and in *Phillips* v. *Barnett* [2] this court held that where structural alterations produced a change of identity the operation of the Act of 1920 was excluded. [*Sinclair* v. *Powell*[3] and *Darrall* v. *Whitaker*[4] were also referred to.]

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[2] [1922] 1 K.B. 222; 38 T.L.R. 39.

The submission that the word is used in that sense in the Act of 1954 is supported by section 12 (1) (*a*), whereby a landlord may obtain possession of premises where "for purposes of redevelopment . . . he proposes to demolish or reconstruct the whole or "a substantial part." Paragraph (*f*) is aimed at encouraging demolition and reconstruction for the purpose of development and improvement of property. It is significant that though the Act provides certain safeguards against landlords who buy properties over the heads of sitting tenants in the hope of using the premises for their own business purposes, no such safeguard is provided against a landlord who buys intending to demolish and reconstruct. These landlords bought this property with the intention of improving it by changing its identity, and the amount of physical work involved in the operation is therefore not the test of "reconstruction."

The cases in which paragraph (*f*) has been considered, which were cited to the county court judge, were all cases in which landlords wanted to obtain possession of premises for their own purposes and could not rely on paragraph (*g*) of section 30 (1) because they had purchased within the five-year period, so that the court was very properly concerned to investigate the genuineness of their "intention" to reconstruct; and the quantum of the work proposed was therefore examined to test the genuineness of the intention. But those decisions—*Atkinson* v. *Bettison*,[5] *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[6] and *Fisher* v. *Taylors Furnishing Stores Ltd.*[7]—do not assist on the present submission, for the judge in the present case found that the intention was fully established.

Alternatively, it is submitted that the concluding words of paragraph (*f*) "and that he could not reasonably do so without "obtaining possession of the holding" apply only to the words immediately preceding them, namely, "to carry out substantial "work of construction on the holding or part thereof"; if what is intended is a reconstruction of the whole of the premises, presumably preceded by demolition, the words as to obtaining possession are otiose, for such fundamental work could not be done without obtaining possession. Thus where a landlord relies only on the first part of paragraph (*f*)—as did these landlords—he does not have to prove that he required possession in order to succeed in his opposition to the grant of a new tenancy.

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[3] [1922] 1 K.B. 393; 38 T.L.R. 239.

[4] (1923) 92 L.J.K.B. 882, 884.

[5] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

[6] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497; [1956] 3 W.L.R. 1134; [1957] Ch. 67; [1957] 1 All E.R. 1 (C.A.).

[7] [1956] 2 Q.B. 78; [1956] 2 All E.R. 78.

W. Norman Francis for the tenants. The work here proposed did not amount to reconstruction either of the holding or of a substantial part of it, within the meaning of that word as it ought to be construed. On the internal evidence of paragraph (*f*), the word "reconstruct" means carrying out physical work and not a metaphysical change of identity, for the word comes between other words with physical connotation—"demolition" and "substantial work of construction"—and it is reasonable to infer that "reconstruct" here has the physical meaning of "rebuild," and involves a measure of demolition preceding the rebuilding. The cases on change of identity under the Rent Acts do not assist here, for the context in which "reconstructed" appears there is quite different from its present context in this Act. Nor is the argument by analogy on section 12 (1) (*a*) of the Act of 1954 helpful, for it seeks to say that because the relevant "reconstruction" for the purposes of section 12 is cut down by the words "for purposes of redevelopment," the word "reconstruct" in section 30 (1) (*f*) has to be extended to be associated with improvement. That cannot be correct, for only certain types of reconstruction bring a landlord within section 12. Turning a holding into a larger holding and doing very little physical work on it might be a desirable redevelopment; but it is not the reconstruction contemplated in section 30 (1) (*f*). If change of identity were a valid form of reconstruction entitling the landlord to resist the grant of a new tenancy as of right, he might succeed where practically no physical work was done, as, for example, by knocking a door through side-by-side shops. That cannot be the intention of the legislature, for this Act is for the protection of tenants of business premises, and the court will scrutinize with particular care all the matters which the landlord has to prove, particularly in cases like the present where the landlords bought over the tenants' head six months and five days before the lease expired, and served notice on them within the five possible days. These landlords never intended to let to the existing tenants, but hoped to get a substantial rent from new multiple store tenants. Therefore the purpose of the Act must be borne in mind in considering whether section 30 (1) (*f*) really has as its purpose the redevelopment and betterment of premises like these.

C. A.
1956

Percy E. Cadle & Co. Ltd.
v.
Jacmarch Properties Ltd.

Alternatively, it is submitted that the proviso to section 30 (1) (*f*) as to obtaining possession applies to the whole of the preceding words of the paragraph. The judge did not make a finding on whether the work could be carried out without the landlords being given possession, but the evidence on both sides showed that it could have been done without surrendering possession.

Denning L.J. This case raises the question of the proper meaning of the word "reconstruct" in section 30 (1) (*f*) of the new Landlord and Tenant Act, 1954.

[His Lordship stated the facts and continued:] The landlords said they would improve the premises a great deal by their work, and argued that the work which they intended to do amounted to a "reconstruction" of "the premises comprised in the "holding." The county court judge held that it did not. Mr. Blundell, for the landlords, has argued before us that the judge has misinterpreted the word "reconstruct" in the Act. I desire to point out that the only premises with which we are concerned here are the ground floor and the basement. It is only if the landlords "intend to reconstruct" those premises that they can resist a new tenancy. We are not concerned with the first floor at all because that is not "comprised in the holding."

Mr. Blundell invites us to say that when you have premises like these shop premises being thrown into a larger whole, so that they lose their identity in the larger whole, that is a "reconstruction." He referred us to the cases with which we are familiar under the Rent Acts regarding change of identity. He conceded that there would have to be some work done, but the amount did not matter very much, so long as there was a change of identity. In my judgment the word "reconstruct" in this section is not satisfied by a change of identity: there must be substantial work of construction. The word "reconstruct" here is best expressed, I think, by the synonym "rebuild." There must be in effect a rebuilding of the premises or, of course, of "a substantial part" of those premises. Whether there is work of that character and to such a degree is primarily a matter for the county court judge. In this case the county court judge looked on the work to the basement floor as a work of repair, and the putting in of the new internal staircases as work of improvement. He thought that there was not a "reconstruction." I think he was right. I would dismiss the appeal.

Hodson L.J. I agree. [His Lordship read section 30 (1) (*f*) and continued:] We are only concerned with the first part of paragraph (*f*); and the county court judge has found that, although the intention to do the work required by the provision was satisfied, nevertheless the landlords were not entitled to oppose the application for a new lease because he did not find that the landlords intended to " demolish or reconstruct the premises comprised " in the holding or a substantial part of those premises." He dismissed the first part of that proposition somewhat summarily and did not consider that the work amounted to a " reconstruc-" tion " of " a substantial part " of the premises.

I think that on consideration of these facts the county court judge arrived at a conclusion which he was entitled to reach on the evidence. The argument which has been directed to this court by Mr. Blundell is based on this proposition: he says that the word " reconstruct " must not be read in too literal a sense. He admits that the word " reconstruct " involves physical work, but he says that that is not necessarily to cover the whole meaning of the word, which may be satisfied by some physical work coupled with a change of identity or character of the building such as is envisaged here. I notice that the word " reconstruct " follows the word " demolish " in the subsection. " Demolish " clearly involves the physical act of destruction; and I agree with my Lord that the word " reconstruct " seems to be equivalent to " rebuild," and to contemplate a state of affairs where there has been a measure of demolition falling short of a total demolition. I think, therefore, that the physical meaning of the word is the meaning which Parliament intended, and that it is not to be distorted by paying attention to the metaphysical aspect of change of identity and change of character.

Ormerod J. I agree. Mr. Blundell's argument was based very largely on the supposition that " reconstruction " primarily meant the changing of the character of the premises, and that, although a certain amount of structural work might be necessary in those circumstances, the amount of such work to be done was in no sense a test as to whether the proposed work was a " recon-" struction." That appears to me to be fallacious. I agree with my Lords that the word " reconstruction " must mean a physical reconstruction of the premises. It must mean, I think, in the first place, a substantial interference with the structure of the premises and then a rebuilding, probably in a different form, of

C. A.
1956

PERCY E. CADLE & CO. LTD. v. JACMARCH PROPERTIES LTD.

such part of the premises as has been demolished by reason of the interference with the structure.

The county court judge appears to have applied his mind to the proper principle, and there was evidence on which he could find as he did. I see no reason why his finding should be disturbed, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Harris, Chetham & Co.; Kinch & Richardson for Allen Pratt & Geldard, Cardiff.*

M. M. H.

C. A.
1956
Oct. 30, 31.

Denning, Hodson and Morris L.JJ.

DRISCOLL *v.* CHURCH COMMISSIONERS FOR ENGLAND.

Restrictive Covenant—Obsolete—Modification—Application by tenant to discharge or modify—Whether covenants "obsolete"—Whether power of tribunal discretionary—Issue of writs for forfeiture—Whether tenant thereafter "person interested"—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (12).

Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Effect of forfeiture pending relief.

The appellant tenant acquired the leases of a number of dwelling-houses of substantial size, of which the respondent commissioners were the freeholders, the leases in each case containing covenants not to use the premises for any trade or business or otherwise than as a private dwelling-house save with the previous written consent of the lessor. The leases, with one exception, were for 99 years, and were due to expire in 1964 and thereafter.

The tenant, who had been using the houses as clubs and hostels for students from overseas, applied to the landlords for permission so to use them. The landlords, who were dissatisfied with the way in which they were being run and maintained, declined to consent except by way of revocable licences which would be personal to the tenant and would contain terms relating to the organization of the activities carried on and to the repair of dilapidations. The tenant, who found these conditions unacceptable, applied in 1949 to the Lands Tribunal pursuant to section 84 of the Law of Property Act, 1925,[1] for an order discharging or modifying the restrictions on the ground that by reason of the passage of time and of changes in social circumstances they had become obsolete and impeded the reasonable user of the premises. In 1952 the landlords issued a number of writs claiming forfeiture for breaches of covenant.

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[1] Law of Property Act, 1925, s. 84 (as amended by the Landlord and Tenant Act, 1954, s. 51 (1)): "(1) The authority . . . shall . . . have "power from time to time, on the "application of any person interested "in any freehold land affected by any "restriction arising under covenant "or otherwise as to the user thereof "or the building thereon, by order "wholly or partially to discharge or "modify any such restriction . . . on

The Lands Tribunal, at a hearing in May, 1956, found that there had been changes in the neighbourhood, and that the houses in question, as well as other similar houses nearby, were in general now too large to be used as single residences, and that many such houses, including some belonging to the landlords, had been converted into flats and guest-houses. The area was, however, still residential, and the residents were entitled to reasonable amenities, which would include the benefit of covenants such as those in suit. Such provisions were not obsolete, as they enabled the landlords to preserve the amenities of the neighbourhood by keeping control over the user of their properties. Further, the landlords had good reason to be dissatisfied with the way in which the tenant's activities were conducted, and with the state of disrepair into which the houses were falling. The tribunal held that the conditions which the landlords required were reasonably necessary to maintain the character of the neighbourhood, and that the applicant had failed to make out his case; in the circumstances the tribunal were unable to exercise their discretion to grant the application. The tenant appealed.

In July, 1956, at the hearing of the landlords' action, Pearce J. granted the tenant relief from forfeiture, subject to certain conditions.

At the hearing of the appeal from the decision of the tribunal, the landlords raised a further preliminary point that they had by issuing writs unequivocally determined the leases, so that there were no subsisting covenants to be discharged or modified, and the tribunal had no jurisdiction in the matter:—

Held, dismissing the appeal, (1) that the tenant had locus standi before the tribunal as a "person interested," notwithstanding the issue of the writs, as the effect of an order for relief would be to re-establish the leases;

Dendy v. *Evans* [1910] 1 K.B. 263 applied;

(2) (*per* Denning and Morris L.JJ.) that the power of the tribunal under section 84 was discretionary and not mandatory;

(3) that in the circumstances the tribunal were justified in coming to the conclusion that the covenants were not obsolete or

"being satisfied—(*a*) that by reason "of changes in the character of the "property or the neighbourhood or "other circumstances of the case "which the authority may deem "material, the restriction ought to be "deemed obsolete, or that the continued existence thereof would "impede the reasonable user of the "land for public or private purposes "without securing practical benefits "to other persons, or, as the case "may be, would unless modified so "impede such user; . . . (12) Where "a term of more than 40 years is "created in land . . . this section "shall, after the expiration of 25 "years of the term, apply to restrictions affecting such leasehold land "in like manner as it would have "applied had the land been freehold: . . ."

restrictive of reasonable user, as they tended to preserve the amenities of the neighbourhood and were still capable of affording protection to the parties entitled to enforce them.

Observations of Romer L.J. in *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application* [1956] 1 Q.B. 261; [1955] 3 All E.R. 559 applied.

APPEAL from the Lands Tribunal.

The appellant acquired the leases of nine houses in Croydon, of which the respondent commissioners were the freeholders. The leases were for 99 years expiring in 1964 or soon thereafter, with one exception which was a 999 year lease. The leases contained covenants by the lessee that the premises should not be used for any trade or business or otherwise than as a private dwelling-house save with the previous written consent of the lessor. The houses were of substantial size, and were occupied by the appellant without the consent of the commissioners as hostels and residential clubs for students from overseas.

The appellant applied to the commissioners for permission in respect of his user of the premises. The commissioners, who were dissatisfied with the way in which the hostels and clubs were being run, and with the appellant's failure to keep them in proper repair, offered to grant permission subject to certain conditions, including requirements that there should be proper supervision in each house by a resident matron or supervisor; that each house should be properly furnished and kept outwardly as a private residence, that there should be no nuisance caused to the neighbours by loud wireless sets; that the appellant should put the premises into proper repair within 12 months, and that the licence in each case was to be personal to the appellant and revocable at the commissioners' pleasure. On November 8, 1949, the appellant made an application to the Lands Tribunal under section 84 (1) of the Law of Property Act, 1925, for the removal or modification of the restrictions so as to permit his user of the premises. On April 7, 1952, the commissioners issued writs in the Queen's Bench Division claiming forfeiture of six leases by reason of the appellant's breaches of covenant as to user and repairs; the defendant counterclaimed for relief from forfeiture.

The application to the Lands Tribunal came on for hearing on May 5, 1956. Before the tribunal, it was admitted for the commissioners that there had been changes in the neighbourhood, and Mr. Clutton, their chartered surveyor, said: "It is true that the "houses were now too large for single occupation, but the com- "missioners would always agree to their conversion into flats or

" to other uses subject to such conditions as they considered fit " to impose to maintain what they consider a proper standard " for the neighbourhood." The president of the tribunal made these findings: " I was of opinion that, although there were " changes in this area of Croydon, those changes were only to the " extent that they reflected the change in regard to the size of " private residences. It is true that few people could afford to " keep these rather large houses as private residences today and " consequently most of them have been converted into flats or " guest houses, but I came to the conclusion that it is still " essentially a residential area and that the owners and lessees " of the houses in the area were entitled to the amenities which " they enjoyed when they entered into their leases. One of those " amenities was the benefit of a covenant that no trade or business should be carried on in the area and that premises should " not be used otherwise than as a private dwelling-house save " with the previous written consent of the lessor. I cannot " regard that provision as obsolete today and I came to the " conclusion that if those amenities were to be preserved the " Church Commissioners should still retain the control which can " be exercised by giving or withholding their consent, subject to " the proposed conditions referred to in paragraph 11 above which " I found as a fact reasonable. Furthermore, it was clear to me " that the gravamen of the objection, which the evidence and " my inspection satisfies me is valid, of the Church Commissioners is the manner in which the applicant conducts these " clubs and the dilapidated condition into which he allowed the " premises to fall. I do not hesitate to say that the applicant's " failure in these respects does injure both the Church Commissioners and the other objectors " (who were other residents). " The only conclusion I can draw is that the applicant's object in " making this application is to free himself altogether from the " reasonable fetters which the Church Commissioners consider " necessary to maintain the character of this neighbourhood. " The applicant failed to satisfy me on any of the grounds set " out in section 84 of the Act as a condition precedent for the " discharge or modification of the covenants." The president then stated: " In these circumstances I felt unable to exercise " my discretion to grant this application."

The appellant appealed from that decision. In the meantime on July 31, 1956, Pearce J., giving judgment in the action, granted the appellant relief from forfeiture subject to his undertaking certain repairs, the order providing that the appellant might disregard the covenants as to user pending the hearing of the appeal from the Lands Tribunal.

At the hearing of this appeal a preliminary point was taken on behalf of the commissioners, that by the issue of their writs the commissioners had unequivocally determined the leases of the six houses in question, so that there were no subsisting covenants to be discharged or modified, and the tribunal had no jurisdiction to entertain the application.

M. J. Albery Q.C. and *W. L. Roots* for the appellant tenant. There are three questions of law for consideration; first, whether these covenants should be regarded now as obsolete and impeding reasonable user; secondly, whether the tenant, after the issue of writs for possession, had any locus standi before the tribunal, and, thirdly, how far if at all the powers of the tribunal under section 84 are discretionary.

On the main question, the tribunal found that it was not now useful or sensible to keep these large houses as single dwelling-houses. The commissioners are prepared to waive the covenants on terms, and have done so in a number of cases, but in the case of this appellant the terms sought to be imposed were so onerous as to be unacceptable. A covenant does not cease to be obsolete merely because the landlords are prepared to waive it by substituting revocable licences containing conditions which may in some cases be oppressive. If it is found that the restriction is of such a nature that its actual enforcement ought to be deemed obsolete or unduly restrictive of reasonable user, then it is contrary to the spirit of section 84 and it is bad in law to uphold it by reference to indirect advantages which a landlord might get by licensing its breach. The duty of the tribunal is to modify the substance of the covenant; in the present case they practically abdicated their functions and handed them over to the landlords. A covenant is obsolete if it cannot or ought not to be enforced throughout the estate. The test is, whether it could properly be inserted in a lease granted today; if, as a matter of estate management, this covenant is not sensible or beneficial under present conditions, then it is obsolete.

It is now being contended that on the issue of writs for possession in 1952 the tenant ceased to have any locus standi before the tribunal, the argument being that as the issue of such a writ is an unequivocal election by the landlords to determine the lease, there is no lease or covenant or tenant remaining, so that section 84 becomes inoperative. But the issue of a writ is not conclusive; the action may fail or relief may be granted under section 146 of the Law of Property Act, 1925, as in fact happened when the actions came to be tried. It appears from *Howard* v. *Fanshawe* [2] and *Dendy* v. *Evans* [3] that when relief is granted the tenant's right relates back as if there never had been any claim for forfeiture. The hearing before the tribunal was prior in date to the trial of the actions, and at all material times the tenant had a chose in action which gave him locus standi to seek relief under section 84.

Assuming that the covenant is obsolete, the duty imposed on the tribunal by section 84 is mandatory, and not discretionary. The section provides that the tribunal "shall have power." There is a well-known principle that words in a statute, which appear prima facie to be permissive, will be construed as mandatory if (i) power is given to a public officer; (ii) it is given for the benefit of persons specifically indicated, and (iii) the legislature has defined the conditions to be fulfilled for its exercise; see Maxwell on The Interpretation of Statutes, 10th ed., p. 239. An example of this is to be found in section 222 of the Companies Act, 1948, which provides that "a company may be wound up by "the court. . . ." But if a company cannot pay its debts, and the creditors are unsympathetic, the court never exercises a discretion, but invariably makes a winding-up order. The principles applicable may be found in *Julius* v. *Lord Bishop of Oxford*.[4] Once a covenant is held to be obsolete, the tribunal must modify it; they have a discretion as to the nature of the modification to be imposed, provided always that such modification does not leave the condition still obsolete.

Percy Lamb Q.C. and *Peter Bristow* for the respondent commissioners. The jurisdiction under section 84 now vests in the tribunal by section 1 (4) of the Lands Tribunal Act, 1949. Originally there was a hearing before special arbitrators, with an appeal by way of re-hearing to the Chancery Division; see *In re Henderson's Conveyance*.[5] Now by section 3 (4) of the Act of 1949 the decision of the tribunal is final, subject to a proviso that any person aggrieved by the decision as being erroneous in point of law may require the tribunal to state a case. Consequently the Court of Appeal cannot go beyond the findings of fact in the case stated.

[2] [1895] 2 Ch. 581.

[3] [1910] 1 K.B. 263.

[4] (1880) 5 App.Cas. 214.

[5] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

The first ground of appeal is that the tribunal were wrong in law in holding that the willingness of the commissioners to grant the appellant revocable licences (subject to conditions) for the user sought by him was a proper and sufficient ground for refusing to modify the restrictions. That is tantamount to saying that the tribunal has not got a discretion, and it should be remembered that the wording of the covenant is not "not to use," etc., but "not to use," etc., "without previous written consent." The tribunal's finding that the restrictions were reasonable cannot be attacked as being erroneous in law.

The second ground of appeal is that there was no evidence on which the tribunal could hold that the restrictions were not obsolete. There is no evidence before the court to test the accuracy of that allegation. There have been changes in the neighbourhood; some of the commissioners' properties have been converted into flats or guest houses, presumably subject to covenants imposing conditions which were reasonable. In *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application*,[6] which dealt with changes in the neighbourhood, Romer L.J. said that a covenant could not be said to be obsolete if its objects were still capable of fulfilment. Here, though the houses are in general too large for single occupation, the area is still residential, and the existence of the covenants enable the commissioners to keep it so, to the benefit of the inhabitants at large.

It is plain from the language of section 84 that the power of the tribunal is discretionary. If an applicant can satisfy the tribunal that a condition precedent for the exercise of the jurisdiction has been established, then the tribunal is empowered, but not compelled, to modify the covenants; the applicant has no right which must be enforced by a public officer; see *Julius* v. *Lord Bishop of Oxford*.[7] The tenant, when he acquired these leases, well knew about the covenants and knew that he would have to observe them; the section gives him no statutory right to such relief. If there were an unopposed application to the tribunal, they could not accede to it out of hand, they must first be satisfied that the requirements of the section were fulfilled.

On the question of the tenant's locus standi, the applicant must be a "person interested" and there must be a covenant in existence. It is established by *Jones* v. *Carter*,[8] *Grimwood* v. *Moss*[9] and *Serjeant* v. *Nash, Field & Co.*[10] that the issue of a writ for possession puts an end to the lease. It is true that on the granting of an order for relief the lease is revived, *Dendy* v. *Evans* [11]; but the observation of Lord Cozens-Hardy M.R.[12] that the issue of a writ did not put an end to the lease went too far. At the date of the hearing before the tribunal the writs had been issued and no order for relief had been granted; there was no lease or covenant in existence on which the section could operate, and the appellant was not then a lessee, so could not be a "person "interested."

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[6] [1956] 1 Q.B. 261, 272; [1955] 3 All E.R. 559.

[7] 5 App.Cas. 214.

[8] (1846) 15 M. & W. 718.

[9] (1872) L.R. 7 C.P. 360.

[10] [1903] 2 K.B. 304.

If the application were to be remitted to the tribunal for re-hearing, it is difficult to see what the tribunal could do. The court could hardly give directions; that would be to usurp the discretionary functions given to the tribunal.

Albery Q.C. in reply. On the question of locus standi the cases can be reconciled without difficulty. By issuing a writ the landlord unconditionally elects to forfeit the lease; if he obtains judgment the forfeiture will relate back and the landlord will get mesne profits. [Woodfall on Landlord and Tenant, 25th ed., p. 1017, and Foa on Landlord and Tenant, 7th ed., p. 642, were referred to.] But if relief is given, that also dates back, and at the date of the hearing before the tribunal there had been no judgment for possession. Alternatively, if the appellant was no longer actually a tenant, he had a chose in action in the form of a claim for relief in the pending action, and so was a "person "interested."

On the main question, it is established that the continued user of these houses as single dwellings is no longer practicable. It is no justification for the continuance of the covenants that the landlord is prepared to waive them subject to the acceptance of revocable licences on onerous terms; that is an impedance of reasonable use, for among other disadvantages, the tenant is unable to raise money on mortgage for repairs. A covenant does not cease to be obsolete because the covenantee offers modification of a sort in particular instances. On the basic facts found by the tribunal these covenants are obsolete, and it was an unjudicial exercise of discretion to refuse to grant a remedy because extraneous and irrelevant matters were taken into account.

DENNING L.J. In the years between 1865 and 1870 the Church Commissioners for England granted leases of certain premises in Croydon at a ground rent for 99 years, and those leases are due to expire in 1964 and the succeeding years. (I

[11] [1910] 1 K.B. 263.

[12] Ibid. 268.

expect they were building leases at a ground rent.) In those leases the commissioners put a restrictive covenant. The usual form was: "the premises shall not be used for any trade or "business or otherwise than as a private dwelling-house save "with the previous written consent of the lessor." Large houses were built—ten-roomed or even twenty-roomed houses—and there is no doubt that at the date when the covenant was made it was contemplated that those houses would be occupied by people of wealth and position with sufficient servants to keep such large houses going for use for a single family. In the course of years—and particularly since the wars, when it has become almost impossible to get servants to staff houses of this size—the Church Commissioners have readily granted consents to these houses being converted into flats or used as guest houses and so forth.

We are concerned with a number of these houses, the leaseholds of which were bought by Mr. Terence John Driscoll a few years back. We were told that when he bought them, some were used as boarding-houses, others were self-contained flats, and two or three were still used for single private dwelling-houses. Mr. Driscoll turned them into hostels and residential clubs for people from overseas. He had, however, not got consent for this user of the premises, so he applied in the year 1949 to modify those restrictive covenants.

There is a procedure which has been in force ever since 1925, prescribed by section 84 (1) of the Law of Property Act, 1925, which set up an authority (now the Lands Tribunal) which, it was provided, "shall . . . have power from time to time, on the application of any person interested in any freehold land affected "by any restriction arising under covenant or otherwise as to the "user thereof or the building thereon, by order wholly or "partially to discharge or modify any such restriction . . . on "being satisfied—(*a*) that by reason of changes in the character "of the property or the neighbourhood or other circumstances of "the case which the authority may deem material, the restriction "ought to be deemed obsolete, or that the continued existence "thereof would impede the reasonable user of the land for public "or private purposes without securing practical benefits to other "persons, or, as the case may be, would unless modified so "impede such user." By subsection (12) this procedure applies to long leaseholds as well as freehold land.

Under that provision Mr. Driscoll applied to the Lands Tribunal to modify this restriction which I have read, and he sought the removal or modification of the restriction so as to permit the user as a private guest house or as a hostel for a residential club. The Church Commissioners, when he sought a modification, did not turn it down altogether. There was a letter in September, 1949, in which the solicitors to the Church Commissioners, writing to the solicitors for Mr. Driscoll, said: "In "certain cases licences have been granted permitting houses on "the commissioners' estate to be used as guest-houses, but the "terms of the licences are such as to preserve the character of "the neighbourhood. . . . We are prepared to take our clients' "instructions with regard to the granting to Mr. Driscoll of a "similar licence. The terms on which Messrs. Clutton would "advise the granting of such a licence are as follows." Then it sets out a number of conditions: that each house should have its own resident matron or supervisor, that it is to be properly furnished, that it is to be kept outwardly as a private residence, that the number of persons occupying each house is to be restricted, that wireless sets are not to be audible outside, and so forth; and the licence was to be "revocable at the commis-"sioners' pleasure and to be personal to Mr. Driscoll." Then Mr. Driscoll has to make good within 12 months all the dilapidations.

So the Church Commissioners offered to grant him permission on those conditions. He did not see his way to agree to those conditions; and one can well see that they were rather stringent. There were negotiations, and he eventually determined to go to the tribunal to see if the tribunal would modify the restrictions. Before he got there, the commissioners issued writs for forfeiture in respect of six out of the nine leases, claiming that the premises were forfeited because he had broken his covenant about user; and certainly he had: he had not the necessary consent of the commissioners. In those actions for forfeiture Mr. Driscoll had to admit that there were breaches, but he counterclaimed for relief from forfeiture. The actions were tried by Pearce J. last July. He granted relief on terms that (in effect) provided for the repairs to be done to the premises and provided for the covenants to be observed either as they stood or as they were modified.

I will mention one point at once, a technical point taken by Mr. Lamb on behalf of the Church Commissioners. He raised it by cross-notice under the new Rules which is, I think, open to him. He said that because of those writs for forfeiture being issued, Mr. Driscoll had no locus standi to apply for these restrictions to be modified at all in regard to six of these leases. He said that the issue of a writ for forfeiture is an unequivocal election by the landlords to determine the leases, and in consequence the leases had gone and the covenants had gone, and that there was nothing left to modify. I do not agree with that argument, for this reason: that, although a writ is an unequivocal election, nevertheless, until the action is finally determined in favour of the landlord, the covenant does not cease to be potentially good. For instance, the forfeiture may not be established; or relief may be granted, in which case the lease is re-established as from the beginning. That appears from the case of *Dendy* v. *Evans*,[1] following what Sir Richard Henn Collins M.R. said in *Serjeant* v. *Nash, Field & Co.*[2] It seems to me that so long as the covenant is potentially good, Mr. Driscoll, or anyone in like position, has a locus standi to apply to the tribunal for a modification of the covenant. So I think that Mr. Driscoll is not to be defeated on any technical point.

Putting that matter on one side, the applications did come before the president of the tribunal, Sir William FitzGerald. He sat himself to hear the case, he heard the evidence, and he went and inspected the site himself. He refused to modify the restriction. Mr. Driscoll appeals to this court.

I must first say a word about appeals from the Lands Tribunal. Parliament has now enacted, in the Lands Tribunal Act, 1949, section 3 (4), " A decision of the Lands Tribunal shall be final "; but then there is this proviso: " Provided that any person " aggrieved by the decision as being erroneous in point of law " may, within such time as may be limited by rules of court, " require the tribunal to state and sign a case for the decision of " the court." That is the provision under which the matter is brought before us. A person who is aggrieved by the decision as being *erroneous in point of law* may bring the matter up to this court. I would not wish those words unduly to hamper an appeal from the tribunal: and I do not think they do, because it is well settled that the question whether or not there is any evidence to support a particular finding is a question of law. It is also well settled that the question whether an inference drawn from primary facts is a legitimate inference is also a question of law. There have been before the Divisional Court several cases of dangerous driving where the Lord Chief Justice and his colleagues, having had primary facts stated, have held that the justices were not justified in dismissing the charge and have directed them to convict. Such was the case of *Bracegirdle* v. *Oxley*.[3] It is for the tribunal of fact to find the primary facts, but having done so, the inferences from those facts are matters upon which an aggrieved person can appeal.

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[1] [1910] 1 K.B. 263.

[2] [1903] 2 K.B. 304; 19 T.L.R. 510.

In this case, therefore, we have to see what are the facts which the tribunal has found, and to see what are the conclusions it has drawn from those facts. Then we have to see whether the conclusions it has drawn are reasonable conclusions for it to draw.

[His Lordship read the tribunal's findings and conclusions, and continued:] So we have those primary facts (if I may so call them) in regard to these premises. When the premises were originally let in 1865 or 1867 it was undoubtedly contemplated that they should be used as single private dwelling-houses only; but at the present day, if they are to be used at all, there has got to be a departure from that purpose which was originally contemplated: they must be turned into flats or into guest houses. In one sense, therefore, the covenant is obsolete, because it can be said no longer to serve the purposes originally contemplated; but, as Sir William FitzGerald says, the covenant still serves a useful purpose in another way: it enables the landlords, the Church Commissioners, to keep control over the use to which these houses are put. It enables the landlords to keep the area as a residential area, instead of being used, as it might have been, for commercial purposes. It seems to me that, so long as the landlord uses this covenant reasonably for a useful purpose, then, even though that purpose goes beyond what was contemplated 90 years ago, the covenant is not obsolete; whereas, if the covenant is shown no longer to serve any useful purpose, then, of course, it is obsolete. And in considering whether it still serves a useful purpose, I think it very important to see the way in which the landlord, or whoever is entitled to the benefit of the covenant, has used it in the past and seeks to use it in the present. If he uses it reasonably, not in his own selfish interests but in the interests of the people of the neighbourhood generally—as, for instance, when he gives his consent for any reasonable change of user—then it will serve a useful purpose. I should have thought that if he uses it unreasonably—for instance, to exact a premium as a condition of his consent; or if he refuses consent altogether when he ought to give it—as, for instance, for turning the house into flats—it would no longer serve a useful purpose. In short, so long as the landlord uses the covenant reasonably in the interests of the public at large it is not obsolete, but, if he seeks to use it unreasonably, then it is obsolete.

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[3] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.

The same result is reached by another line of reasoning. Assume that the covenant is obsolete because the premises cannot be used for single dwelling-houses. Nevertheless I am clearly of opinion that the tribunal has a discretion whether to discharge or modify these restrictions. We have been referred to the case of *Julius* v. *Lord Bishop of Oxford*[4] which lays down the circumstances in which permissive words in a statute can be treated as compulsive. Mr. Albery urged us to say that the power given by the words "the authority shall have power by order wholly or "partially to discharge or modify any restriction" is not only a permissive power but imposes a duty on the tribunal to modify the restriction in some way or other, though it has a discretion as to the precise way to be adopted. I do not agree with that view. It seems to me that this section does give a discretion in the tribunal whether to modify the restriction at all. In this case the president of the Lands Tribunal, having considered the matter and seen the premises, has said that in his discretion he does not think it is reasonable to modify it in the way proposed or sought by Mr. Driscoll. I see no reason to suppose that he exercised his discretion wrongly.

I would only add that, before the tribunal, the applicant sought to make a case on the second limb of section 84 (1) (*a*)—"that the "continued existence thereof"—that is, of the restriction—"would impede the reasonable user of the land for public or "private purposes without securing practical benefits to other "persons." The president of the tribunal found that that was not made out. On the facts which I have stated, it seems to me that he was well justified in so saying. The continued existence of this restriction does not impede the reasonable user of the land when we know that, on the findings of the tribunal, the Church Commissioners have given their consent freely and reasonably to all reasonable changes of user, such as enabling the houses to be turned into flats or into guest houses, subject to conditions which they have felt it necessary to impose in order to preserve the residential character of the area.

I can find no fault in point of law with the reasoning of the tribunal, and I would dismiss the appeal accordingly.

HODSON L.J. I am of the same opinion. The Church Commissioners on April 7, 1952, issued a writ against the applicant and another for possession of all the premises the subject of this application save two, based on forfeiture of the leases for breach of the covenant sought to be modified in this application. The rival contentions were these. On the one hand it was said by the Church Commissioners that the leases were determined by the forfeiture, so that there are no subsisting covenants to be discharged or modified. On the other hand the applicant says that the issue of the writ did not determine the applicant's interest in the premises, and that the leases subsisted until the determination of the action and the counterclaim for relief from forfeiture. He relied on *Dendy* v. *Evans*,[5] a decision of this court, where it was held, affirming a decision of Darling J. in the King's Bench Division, that " though the issue and service of the writ to recover " possession operated as a final election by the lessor to determine " the lease, the effect of the order for relief was to restore the lease " as if it had never become forfeited," and, therefore, certain other consequences followed. One passage in the judgment of the Master of the Rolls was commented upon, where he said[6]: " I " therefore think that it is reasonably clear that there was nothing " in the issue of the writ in the action of *Dendy* v. *Wallis*[7] which " put an end to the lease, and, further, that the mere issue of the " writ in that action had no effect or operation upon the under- " lease." That sentence at first sight appears to be in conflict with earlier authorities—*Jones* v. *Carter*,[8] *Grimwood* v. *Moss*[9] and *Serjeant* v. *Nash, Field & Co.*[10]—to which our attention was drawn, all of which cases were cited to the Court of Appeal in the case of *Dendy* v. *Evans*[11]; and I think that the circumstances in which the court came to that conclusion are perhaps illuminated when one looks at one of those earlier cases, *Serjeant* v. *Nash, Field & Co.*,[12] also a decision of this court. The passage to which I refer is where the Master of the Rolls said this[13]: " There is a final determination of a tenancy under a lease when " the lessor, by some final and positive act which cannot be " retracted, treats a breach of covenant by the lessee as consti- " tuting a forfeiture." Later in his judgment the Master of the Rolls said[14]: " It is true that the rights of the parties were not " determined by the issue of the writ, and could not be finally " determined until the result of the action was known."

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[4] (1880) 5 App.Cas. 214.

[5] [1910] 1 K.B. 263.
[6] Ibid. 268.
[7] Unreported.
[8] (1846) 15 M. & W. 718.
[9] (1872) L.R. 7 C.P. 360.
[10] [1903] 2 K.B. 304.
[11] [1910] 1 K.B. 263.
[12] [1903] 2 K.B. 304.
[13] Ibid. 310.
[14] Ibid. 311.

C. A.
1956

Driscoll v. Church Commissioners for England.

Hodson L.J.

I think the effect of the authorities is that the right of the applicant is not destroyed for this purpose, bearing in mind that the right to relief relates back, just as the right to forfeiture relates back; so that the preliminary objection taken in respect of the six cases, I think, fails. But when one comes to the substantive matter under section 84, the applicant has to satisfy the authority—that is to say, the Lands Tribunal—before the tribunal can make an order, that certain preliminary circumstances are established. In this case the applicant has relied on section 84 (1) (*a*), " that by reason of changes in the character of " the property or the neighbourhood or other circumstances of the " case which the authority may deem material, the restriction " ought to be deemed obsolete, or that the continued existence " thereof would impede the reasonable user of the land for public " or private purposes without securing practical benefits to other " persons, or, as the case may be, would unless modified so " impede such user." With regard to the second alternative, the Lands Tribunal took into account the way in which the properties in question had been managed by the landlords in the past, and came to a conclusion adverse to the applicant. The president expressed himself, in the judgment to which our attention was drawn, in this way: " I cannot hold that the Church Commis" sioners are so enforcing the restrictions as to impede the " reasonable user of the premises for public or private purposes " without securing practical benefits to other persons." I think that he was, in considering the alternative to which I am now referring, entitled to take that matter into consideration, and, therefore, there is no valid criticism which can be made against his conclusion in that respect.

The main attack on the conclusion of the president of the Lands Tribunal has been made by Mr. Albery, however, on the ground that he was wrong in that he misdirected himself, and, alternatively, that there was no evidence upon which he could come to the conclusion that the restriction ought not to be deemed obsolete, because it is said that on the face of the findings of fact which he made the restriction was obsolete, and that he was only diverted from the right conclusion by taking into consideration the activities of the commissioners in this case. I think that has been a difficult question, because for my part I agree with Mr. Albery's submission that in considering the question of obsolescence it is not relevant to consider whether the Church Commissioners will or will not withhold their consent to the covenant not being enforced or not being kept alive in a particular case subject to certain restrictions. One has to consider the circumstances of the covenants of the estate as found as a fact by the tribunal and then consider whether as a matter of law the tribunal was right in coming to the conclusion that the provision was not obsolete. Some assistance, I think, can be obtained, in considering this question, from what this court said in a judgment delivered by Romer L.J. (the other members of the court concurring) in *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application.*[15] He in that judgment considered the word "obsolete" and the definitions in the Oxford Dictionary to which the attention of the court had been drawn, and he said [16] that it seemed to him that "the meaning of the term 'obsolete' may "very well vary according to the subject-matter to which it is "applied"; and dealing with that case (which was a case of a kind like this where a restriction in a covenant had to be considered) he said [17]: "I cannot see how, on any view, the cove-"nant can be described as obsolete, because the object of the "covenant is still capable of fulfilment, and the covenant still "affords a real protection to those who are entitled to enforce it."

I think that one gets some assistance from that passage in considering whether or not the Lands Tribunal was entitled as a matter of law to come to the conclusion which it did reach. I would first of all say that what one has to consider is the restriction against use of the premises otherwise than as a private dwelling-house. One is not considering the question of whether the premises shall or shall not be used for trade or business. Nor do I think that one gets any real assistance, in considering the restriction for use otherwise than as a private dwelling-house, from considering the provision "save with the previous written "consent of the lessor," because that, to my mind, does not really assist one in considering whether or not the covenant is obsolete. I for my part am driven to consider what is the true effect of the finding of fact in the case, because, so far as facts are concerned, apart from inferences which can properly be drawn from the facts, we are held closely, by the provisions of the Act of 1949, to the findings of the tribunal. The case stated by the president reads: "I was of opinion that although there were changes in "this area of Croydon those changes were only to the extent that "they reflected the change in regard to the size of private "residences. It is true that few people could afford to keep

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[15] [1956] 1 Q.B. 261; [1955] 3 All E.R. 559.

[16] [1956] 1 Q.B. 261, 271.

[17] Ibid. 272.

"these rather large houses as private residences today and consequently most of them have been converted into flats or guest "houses, but I came to the conclusion that it is still essentially "a residential area and that the owners and lessees of the houses "in the area were entitled to the amenities which they enjoyed "when they entered into their leases." He continued: "One of "those amenities was the benefit of a covenant that no trade or "business should be carried on in the area and that premises "should not be used otherwise than as a private dwelling-house "save with the previous written consent of the lessor." I also have in mind the fact (which is referred to in the case) that the president had viewed the residences the subject-matter of this appeal. I am sorry that there is not more information as to these particular houses, because it is very easy to generalize and say that nobody nowadays lives in a big house, that they cannot afford to heat them, that they cannot afford to staff them, and that at best they can only "camp out" in one corner of the place; we have not really the full details as to the size of these houses; but reading the conclusion of fact as to the majority of houses no longer being occupied as private residences while a few were, consent having been given, no doubt, to the conversion of the majority for multiple housing, I am of opinion that there is material there upon which the president could arrive at the conclusion at which he did, namely, that the provision was not obsolete.

So that, even on the first limb, where I accept that the applicant is on stronger ground than on the second, I think that the applicant fails to satisfy this court that there is any ground upon which this court can interfere with the conclusion of the tribunal. It, therefore, is not relevant for me to go further and consider the question of discretion. Anything I may say on that question is really no part of the ground of my decision on the main issue in the case. But it would appear to me that this is one of those cases where the discretion of the Lands Tribunal is at large, so that it would be (as it was in the *Truman, Hanbury & Buxton* [18] case) really futile to send this case back for a reconsideration of the question of the exercise of discretion, because no directions which we could give would be likely to produce a different result from that which was reached—on the footing that he had discretion—by the president in the case.

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[18] [1956] 1 Q.B. 261, 271.

MORRIS L.J. I have reached the same conclusions. Mr. Driscoll has been using the properties which are in question for the purpose of having guest houses or hostels forming a residential club for Commonwealth students. That is a laudable purpose. The president of the Lands Tribunal in his judgment described the establishment of such clubs for Commonwealth students as being highly desirable and as being a purpose to be encouraged if possible. The real dispute that has arisen between the parties is as to the way of achieving that purpose. For, as the president also pointed out, the Church Commissioners have stated that they have been at all times willing to allow Mr. Driscoll to use the premises as private guest houses or hostels for a residential club: it has been a question as to how and upon what conditions the purpose should be achieved.

Mr. Driscoll has invoked the procedure that is permissible under section 84 of the Law of Property Act, and has asked for the modification or discharge of certain restrictions. The jurisdiction under that section used to be exercised by official arbitrators, and there was an appeal to a nominated judge, who was a judge of the Chancery Division. In *In re Henderson's Conveyance*,[19] Farwell J. set out what was the approach of the court when hearing an appeal from the official arbitrator. But now, since the Act of 1949, the determination of these matters is by the Lands Tribunal. Section 1 (4) of the Lands Tribunal Act, 1949, provides that the Lands Tribunal shall exercise "the jurisdiction conferred on the "authority under section 84 of the Law of Property Act, 1925." It is provided by section 3 (4) that the decision is final, subject to the proviso as to the rights of any person "aggrieved by the "decision as being erroneous in point of law" to have a case stated for the decision of the Court of Appeal.

Now, when the hearing took place before the Lands Tribunal in May, 1956, an action was pending but had not been heard in which, in reference to those houses in respect of which there was a right of re-entry, there had been writs served claiming forfeiture. In those actions there were counterclaims by Mr. Driscoll for relief. The actions were not heard until July of 1956, after the date of the hearing before the Lands Tribunal. But it seems to me that at the date of the hearing before the Lands Tribunal Mr. Driscoll was a "person interested" within the language of section 84. Section 84 begins with the words: "The authority "hereinafter defined shall (without prejudice to any concurrent "jurisdiction of the court) have power from time to time, on the

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[19] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

"application of any person interested. . . ." Mr. Driscoll was, in my judgment, a "person interested." He had his claim to be relieved; and the authority of *Dendy* v. *Evans* [20] in this court shows that, though the issue of a writ may amount to a final election on the part of a lessor to treat a lease as forfeited, the effect of an order for relief is to restore the lease as if it had never become forfeited. Mr. Driscoll had the right to claim that relief. In my judgment, at the date of the hearing before the Lands Tribunal, Mr. Driscoll had a locus standi: he was a "person "interested."

The application was based on two grounds: it was said that the restriction was obsolete; and it was said that the continued existence of the restriction "would impede the reasonable user of the "land for public or private purposes without securing practical "benefits to other persons." The restriction which Mr. Driscoll sought to modify was the restriction to the effect (and I am quoting from the case stated) that "the premises shall not be "used for any trade or business or otherwise than as a private "dwelling-house save with the previous written consent of the "lessor." The substance of the matter was that the application related to the restriction concerning user otherwise than as a private dwelling-house. It was not really suggested that the restriction that the premises should not be used for any trade or business was obsolete, or was impeding reasonable user, though there had to be a request for modification of that restriction because the use to which Mr. Driscoll puts the premises is technically a carrying on of a trade or business.

The president of the Lands Tribunal held that the applicant failed to satisfy him "on any of the grounds set out," and I read that as meaning, failed to satisfy him either that the restriction was obsolete or that it impeded reasonable user. In regard to the latter of those, the president, in the decision (which, though not strictly part of the case stated, has been by mutual assent of the parties referred to) after referring to the undertaking of the Church Commissioners, said: "In the light of this undertaking I cannot "hold that the Church Commissioners are so enforcing the restric-"tions as to impede the reasonable user of the premises for public "or private purposes without securing practical benefits to other "persons." It seems to me that in view of that finding it is very difficult to submit that the continued existence of these two restrictions would impede the reasonable user of the land; and I see no reason for thinking that the president made any error in law in so deciding.

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[20] [1910] 1 K.B. 263.

As to the restriction preventing the user otherwise than as a private dwelling-house, he came to the conclusion set out in the case, which has been referred to by my Lords. He came to the conclusion that the area "is still essentially a residential area," although "few people could afford to keep these rather large "houses as private residences today." Those findings of his, it seems to me, are sufficient to warrant his conclusion that the restriction is not obsolete.

I derive considerable help from the judgment of Romer L.J. in this court in *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application.*[21] Romer L.J. said: "It seems to me that if, as "sometimes happens, the character of an estate as a whole or of "a particular part of it gradually changes, a time may come when "the purpose to which I have referred can no longer be achieved, "for what was intended at first to be a residential area has "become, either through express or tacit waiver of the covenants, "substantially a commercial area." Nothing of that kind has happened in the present case. Then there is a further passage where Romer L.J. said[21]: "I cannot see how, on any view, the "covenant can be described as obsolete, because the object of the "covenant is still capable of fulfilment, and the covenant still "affords a real protection to those who are entitled to enforce it." It seems to me that this covenant is still capable of fulfilment even though there may not be many people who could afford to keep these rather large houses. Furthermore, the covenant does afford a real protection. As the president pointed out, there are other tenants of the same lessors who regard it as an amenity that premises should not be used otherwise than as a private dwelling-house save with the previous written consent of the lessor. This covenant is a protection for the lessors in that it enables them to preserve this desirable amenity. Other tenants of property may regard it as a considerable protection to them if the consent of their lessor is needed in respect of other properties.

Mr. Lamb made a point that there is significance in the fact that the covenant provides that the user shall not be "otherwise "than as a private dwelling-house save with the previous written "consent of the lessor." It is true, as Mr. Albery pointed out, that in one sense the words as to consent do not add very much since in any case, whether those words are there or not,

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[21] [1956] 1 Q.B. 261, 272.

C. A.
1956

DRISCOLL
v.
CHURCH
COMMISSIONERS FOR
ENGLAND.

Morris L.J.

any lessor can give his consent. But it seems to me that those words do have some significance. They rather point to the possibility, contemplated when the leases were entered into, that there might come a time when some consent would be needed, and perhaps for the reason that, though the area would continue to be a residential area, it might not be possible for a whole house always to be in single occupation. It might be quite a satisfactory position for the tenants—who might in a particular area all be tenants of the one lessor—to repose confidence in their lessor that written consents would in proper cases be granted so as to preserve the character and amenities of an area. This would particularly be so if the lessors were considered to be managing the property in the interests of all concerned, of the lessors and the lessees, and of the local community as a whole.

I therefore do not think that the president in any way made an error in law when he came to his conclusions. I would only add, without repeating what has been said, that I am in entire accord with what my Lord, Denning L.J., said in regard to the topic of discretion; and applying the passages in *Julius* v. *Lord Bishop of Oxford* [22] to the circumstances of this case I adopt the same method of approach as that referred to by my Lord.

Appeal dismissed.

Solicitors: *Kinch & Richardson for Copley Singleton & Billson, Croydon; Milles, Day & Co.*

F. R. D.

[22] 5 App.Cas. 214.

C. A.
1956
Dec. 17, 18.

Singleton, Jenkins and Parker L.JJ.

REGINA *v.* FLINTSHIRE COUNTY COUNCIL COUNTY LICENSING (STAGE PLAYS) COMMITTEE.

Ex parte BARRETT.

Theatre — Licence — Rules — Condition prohibiting the sale of liquor and tobacco in theatre—Theatre continuously licensed for sale of liquor and tobacco—Application for renewal of licence on same terms as before — Proximity of licensed premises to theatre — Whether distinction between application for renewal and application for grant of licence for first time—Proximity of licensed premises a factor to be taken into account—"Rules for ensuring "order and decency"—Prohibition of sale of tobacco—Theatres Act, 1843 (6 *&* 7 *Vict. c.* 68), *ss.* 5, 9.

By section 9 of the Theatres Act, 1843: "The . . . justices " . . . shall make suitable rules for ensuring order and decency "at the several theatres licensed by them within their "jurisdiction. . . ."

C. A.
1956

REGINA
v.
FLINTSHIRE
COUNTY
COUNCIL
COUNTY
LICENSING
(STAGE
PLAYS)
COMMITTEE.
Ex parte
BARRETT.

Each year since its opening in 1901 a theatre in Rhyl, the Queen's Theatre, was licensed as a theatre. Rule 3 of the Theatrical Licences Rules, to which the annual licence was subject, provided that "no spirituous liquors, wine, ale, beer, porter, cider, "perry or tobacco shall be sold or disposed of in the theatre," but that rule had each year been deleted from the conditions attached to the licence so that for over 50 years the theatre had been continuously licensed for the sale of intoxicating liquor and tobacco. There was no suggestion of any misconduct at the theatre and in February, 1956, application was made for the renewal of the theatrical licence in respect of the Queen's Theatre under the same terms and conditions as before, namely, with the deletion of rule 3. The county licensing committee for stage plays, having granted a theatrical licence in respect of another theatre in the district subject to compliance with rule 3, decided that, to be consistent and taking into account the fact that there were adequate drinking facilities at licensed premises near by, the Queen's Theatre should be granted a licence on similar terms. On an application by the manager of that theatre for an order of mandamus requiring the committee to hear and determine the application according to law, or alternatively to delete rule 3 from their order on the grounds, inter alia, that the committee, in imposing the prohibition had been actuated by extraneous considerations, the Divisional Court refused the application. On appeal:—

Held, that although the proximity of other facilities for obtaining intoxicating liquor might be a relevant circumstance to be taken into account in determining whether a licence should be granted subject to rule 3, it did not follow that as a general principle rule 3 should be included in any case where it could be said that adequate facilities existed elsewhere; each case should be considered on its merits and, in the circumstances, regard should be had to the fact that the Queen's Theatre had for 50 years been licensed for the sale of intoxicating liquor; accordingly, an order of mandamus should be granted.

Reg. v. *Sheerness Urban District Council* (1898) 14 T.L.R. 533; 62 J.P. 563 considered.

Per Singleton L.J. The committee ought not to have imposed rule 3 on the Queen's Theatre unless in some way that rule could promote order and decency within the house, and I do not see that it could in view of the history of the house.

Per Jenkins L.J. The committee wrongly pursued consistency at the expense of the merits of individual cases.

Per Parker L.J. The prohibition was imposed pursuant to section 9 of the Act of 1843, and in regard to that section the discretion of the committee is within narrow limits, in that the rules and conditions laid down shall be only those which are suitable, albeit not necessary, for ensuring order and decency. It seems to me there was no evidence on which the committee could impose the prohibition on the sale of liquor in the form of a rule under section 9.

C. A.
1956

REGINA
v.
FLINTSHIRE
COUNTY
COUNCIL
COUNTY
LICENSING
(STAGE
PLAYS)
COMMITTEE.
Ex parte
BARRETT.

Decision of the Divisional Court [1956] 1 W.L.R. 1415; [1956] 3 All E.R. 535 reversed.

APPEAL from the Divisional Court.[1]

The following facts were stated in affidavits filed in support of a motion for an order of mandamus, directed to the Flintshire County Council County Licensing (Stage Plays) Committee, commanding it to hear and determine according to law an application for the grant of a theatrical licence in respect of the Queen's Theatre, Rhyl, without a ban on the sale of intoxicants and tobacco.

The theatre in question was first opened in 1901, and from then until March, 1956 (save for a short period in 1907 when it was being rebuilt after destruction by fire), the theatre was continuously licensed as a theatre and/or cinema. Rule 3 of the Theatrical Licences Rules,[2] to which the annual licence was subject, provided that "no spirituous liquors, wine, ale, beer, "porter, cider, perry or tobacco shall be sold or disposed of in "the theatre"; but that rule had each year been deleted from the conditions attached to the licence granted to the Queen's Theatre, so that from 1901 until March, 1956, the theatre had been continuously licensed for the sale of intoxicating liquor and tobacco. The last occasion on which any objector had appeared to oppose the grant of a licence with permission to sell liquor in respect of the Queen's Theatre was in March, 1951, when the Free Church Council opposed the application, but expressly stated that there was no suggestion of misconduct at the theatre. In subsequent years the objection by the Free Church Council was not renewed and it was expressly stated on the council's behalf in March, 1954, that the churches did not object to the grant of permission in respect of the Queen's Theatre because it had been granted for many years and the churches had to be reasonable. On February 11, 1956, the manager of the Queen's Theatre applied to the Flintshire County Council County Licensing (Stage Plays) Committee for the renewal of the theatrical licence at the theatre under the same terms and conditions as the previous year, namely, inter alia, with the deletion of rule 3. The application was heard by the committee on March 9, 1956, together with a similar application in respect of another theatre in Rhyl, the Pavilion Theatre, owned by the Rhyl Urban District Council. The Pavilion Theatre, which had never had permission to sell intoxicating liquor (save for the period April, 1939, to September, 1940), also asked that rule 3 be deleted from the conditions attached to their licence. At the hearing no objector opposed the application for the deletion of rule 3 from the licence in respect of the Queen's Theatre, but the Free Church Council, as in previous years, did make such objection in the case of the Pavilion Theatre, and the committee, having heard both applications, retired to consider their decision. Upon retiring, according to the affidavit sworn by Richard Stephen Davies, the chairman, the committee, " . . . were advised by the clerk of the committee " that we should consider each application separately and on its " own merits; that we had a discretion to allow or refuse the " application to delete . . . rule 3 from the conditions attaching " to the grant of a theatrical licence in either or both cases; but " that our discretion must be exercised properly in a judicial and " reasoned way." Paragraph 8 of the affidavit stated: " The " committee first considered the application relating to the " Pavilion Theatre . . . and most of the members of the " committee were of the opinion that it was unnecessary and " undesirable to provide drinking facilities at this theatre because " there were adequate facilities already provided at nearby " licensed premises. It was decided by a substantial majority " that this application be granted but that the said rule 3 should " not be deleted from the conditions attached to the theatrical " licence for this theatre. 9. The committee thereupon con- " sidered . . . the application [in respect of the Queen's Theatre] " and the view was expressed that the grounds upon which the " committee had refused to delete the said rule 3 from the " conditions attaching to the theatrical licence for the Pavilion " Theatre . . . (which is situated a short distance from the " Queen's Theatre . . .) applied with even greater force to the " Queen's Theatre in that it was known to members of the com- " mittee that a large hotel with a number of bars adjoined the

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[1] [1956] 1 W.L.R. 1415; [1956] 3 All E.R. 535.

[2] Theatres Act, 1843, s. 5: "The justices of the peace within "every county . . . in which application shall have been made to "them for any such licence as is "hereinafter mentioned, shall, within "21 days . . . hold a special session ". . . for granting licences to houses "for the performance of stage plays ". . ." S. 9: "The . . . justices ". . . shall make suitable rules for "ensuring order and decency at the "several theatres licensed by them "within their jurisdiction . . ."

Local Government Act, 1888, s. 7: "There shall be transferred to "the county council . . . the business "of the justices of the county out "of session—(*a*) in respect of the "licensing of houses or places for "the public performance of stage "plays. . . ."

Local Government Act, 1933, s. 85 (1): "A local authority may "appoint a committee for any . . . "general or special purpose . . . and "may delegate to a committee so "appointed . . . any functions exercisable by the local authority. . . ."

" Queen's Theatre and that patrons of this theatre could obtain " access thereto by crossing a narrow covered arcade. It was " pointed out by me and the clerk of the committee that the " Queen's Theatre had hitherto been granted theatrical licences " with rule 3 deleted from the conditions attached thereto, but " it was felt by members of the committee that this did not " fetter their discretion in considering the present application. " Members expressed the view that, whatever had been done in " the past, it was their duty to consider the present application " on its merits as they saw them and that their decisions must " be consistent if justice was to be done as between applicants. " It was unanimously agreed that the . . . application [in " respect of the Queen's Theatre] to delete . . . rule 3 from the " conditions attaching to the grant of a theatrical licence should " be refused and that a theatrical licence for the year 1956–1957 " should be granted in respect of this theatre, subject, inter alia, " to compliance with the said rules."

The committee accordingly granted a theatrical licence in respect of the Queen's Theatre, subject, inter alia, to compliance with rule 3.

The applicant, Thomas Wesley Barrett, the accountant and secretary of Rhyl Entertainments Ltd. (the proprietors of the Queen's Theatre) and the actual and responsible manager of the theatre, applied for an order of mandamus directed to the committee commanding it to hear and determine according to law the application of February 11, 1956, for the grant of a theatrical licence in respect of the Queen's Theatre under the same terms and conditions as before or, alternatively, commanding the committee to delete rule 3 from its order, on the grounds that the committee had failed to hear and determine the application according to law; that the committee had failed to act judicially in accordance with the rules of reason and justice; that the committee had failed properly to exercise the discretion vested in it by the county council under section 5 of the Theatres Act, 1843, section 7 (*a*) of the Local Government Act, 1888, and section 85 (1) of the Local Government Act, 1933; that the committee, in purporting to determine the application, was actuated by or purported to be actuated by extraneous considerations, namely, its desire to adopt a general policy of uniformity in regard to the licensing of theatres; and that the committee, in seeking to adopt that general policy and impose uniformity had prejudged the application and/or failed to determine it on the merits of the particular case.

C. A.
1956

REGINA
v.
FLINTSHIRE
COUNTY
COUNCIL
COUNTY
LICENSING
(STAGE
PLAYS)
COMMITTEE.
Ex parte
BARRETT.

The Divisional Court, dismissing the application, held that it was bound by authority to hold that the proximity of a licensed house was a matter which the committee might take into account in considering whether or not to allow the sale of liquor in a theatre and that the committee had determined the application according to law.

The applicant appealed.

Edmund Davies Q.C. and *R. G. Waterhouse* for the applicant. For over 50 years the Queen's Theatre has been granted a stage play licence with rule 3 deleted. No complaint has at any time been made as to the way in which the theatre was conducted. Yet in 1956, when application was made for a new annual licence, on the same terms, the committee granted a licence subject only to the condition that no intoxicating liquors and no tobacco should be sold on the premises. There had been no opposition offered by anybody. The proper conclusion is that the committee have not heard and determined according to law the application which had been made to them. In Rhyl it had been customary to delete rule 3. Section 9 of the Theatres Act, 1843, empowered justices to make suitable rules for ensuring order and decency at the theatres licensed by them, but section 4 of the Licensing Act, 1953, vested a substantially wider discretion in the justices than was vested in them by section 9. The only relevant consideration that the committee, sitting on applications for theatre licences, should weigh and consider is the ensuring of order and decency. This has not been taken into account by the committee and this court can say to the committee: "On your own affidavit you "have taken into consideration the drinking in adjacent public "houses and that is irrelevant." Of course, this court cannot say what the decision of the committee will be, but it can direct the committee to omit that irrelevant consideration entirely. The strong probability is that order and decency is more likely to be secured by having drinking facilities within a theatre. The Divisional Court felt that it was bound by the earlier decision of *Sharp* v. *Wakefield*,[3] where it was held that the committee had rightly taken into consideration what other facilities for drinking existed. That, however, was a case dealing with a public house in which the discretion was quite unfettered.

[SINGLETON L.J. If the committee is satisfied that the drinking facilities applied for in the theatre are to be in a proper place, then the facilities for drinking outside the theatre have nothing to do with order and decency in the theatre.]

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[3] [1891] A.C. 173.

Moreover, if the committee, in order to be consistent, think that they must make the same decision in regard to the Queen's Theatre as they have made with regard to the Pavilion Theatre, then they have not heard and determined the Queen's Theatre application according to law.

It is submitted: (1) When granting a theatre licence the committee may attach to it only such conditions as are suitable for ensuring order and decency at the particular theatre. (2) There was no material upon which the committee could hold that ensuring order and decency at the Queen's Theatre rendered suitable the prohibition against selling either intoxicants or tobacco. (3) The committee could and should have exempted the sale of tobacco from the prohibition. (4) There was no hearing and determining of the individual application because the decision was arrived at solely by being consistent with another decision relating to another theatre. (5) The committee improperly ignored its experience of the Queen's Theatre for over 50 years and gave the applicant no opportunity of dealing with the matter by argument. Therefore the order for mandamus should be granted. *Reg.* v. *West Riding of Yorkshire County Council*[4] and *Reg.* v. *Sheerness Urban District Council*[5] are distinguishable.

J. C. Llewellyn for the committee. The committee desire, so far as possible, to be of assistance to the court, and will welcome whatever observations it may think fit to make. They are not here as litigants and have no wish to be contentious. It was because of the decision in *Reg.* v. *Thornton*[6] that they did not appear before the Divisional Court, and it is in the hope of being of assistance and of receiving guidance in the discharge of their duties that they are now represented. As to the submission that the committee was not entitled as a matter of law to take into consideration the fact that there were licensed premises in the immediate vicinity of the theatre, under the Theatres Act, 1843, there are clearly two discretions which can be used, (1) a perfectly general discretion under section 5, and (2) a more limited discretion under section 9. Each annual application for a licence falls to be treated as a fresh licence and not as a renewal. It is not suggested that no consideration is to be given to what has happened before, but it is for the committee to exercise its discretion at the time of the application and to take an honest view on proper material. Different weight may be given by different committees. It is quite wrong to say that the licence to sell drink and tobacco was refused to the Queen's Theatre simply because a licence was refused to the Pavilion. Among other things, the committee considered it was undesirable that young children should see adults flocking to the bars in the theatre for drink. When the application for a licence was made to the committee tobacco was not even mentioned. Three cases cover this appeal and no order of mandamus should be made.

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[4] [1896] 2 Q.B. 386; 12 T.L.R. 454.

[5] (1898) 14 T.L.R. 533; 62 J.P. 563.

[6] [1898] 1 Q.B. 334.

Singleton L.J. The granting of theatrical licences is governed by the Theatres Act, 1843, section 5 of which provides: "The justices of the peace within every county, riding, division, "liberty, cinque port, city, and borough in Great Britain beyond "the limits of the authority of the Lord Chamberlain, in which "application shall have been made to them for any such licence "as is hereinafter mentioned, shall, within 21 days next after "such application shall have been made to them in writing "signed by the party making the same, and countersigned by at "least two justices acting in and for the division within which "the property proposed to be licensed shall be situate, and "delivered to the clerk to the said justices, hold a special "session in the division, district, or place for which they usually "act, for granting licences to houses for the performance of "stage plays, of the holding of which session seven days' notice "shall be given by their clerk to each of the justices acting "within such division, district, or place."

By the Local Government Act, 1888, the council of the counties and county boroughs became the licensing authority. Provision was made in the Act for delegating their powers to a committee, and the county council of Flintshire in due course delegated their powers to the committee which heard the application of Mr. Barrett in March, 1956. There is a further provision in section 9 of the Act of 1843, which is headed: "Rules for enforcing order in the theatres licensed by the "justices," and which reads: "The said justices of the peace "at a special licensing session, or at some adjournment thereof, "shall make suitable rules for ensuring order and decency at "the several theatres licensed by them within their jurisdiction, "and for regulating the times during which they shall severally "be allowed to be open, and from time to time, at another "special session, of which notice shall be given as aforesaid, may "rescind or alter such rules"; there is power under section 9 for the Secretary of State to rescind or alter such rules.

It appears that there has been adopted a set of rules made under the powers given by section 9, and that those rules are in use throughout England and Wales. The rules are headed: "Theatrical Licences Rules" of which rule 3 reads: "No "spirituous liquors, wine, ale, beer, porter, cider, perry, or "tobacco shall be sold or disposed of in the theatre." The committee, when granting a theatrical licence, may include such of these rules as they think proper, and they may strike out any one of the rules which they do not think ought to be applied. I dare say in the great majority of cases it is the practice to strike out rule 3. I should imagine that in most houses to which a theatrical licence attaches, the sale of intoxicating liquor and the sale of cigarettes is allowed.

[His Lordship stated the facts, referred to the chairman's affidavit, and continued:] Thus after 54 years during which a licence had been granted with rule 3 deleted, from March, 1956, rule 3 is to apply; the two bars which have existed in the theatre for many years become useless; the proprietors of the theatre cannot sell intoxicating liquor, nor can they sell even a packet of cigarettes, though people are allowed to smoke in the house. It was considered by the committee better that those who desired to have a drink should go out of the house altogether to some nearby hotel or public-house and have their drink there, at which place they would not have the advantage of a bell sounding in the bar to summon them back to their places in the theatre, and on their return they might cause a certain amount of discomfort to those who had remained in their seats in the theatre.

Lord Goddard C.J., Hallett and Donovan JJ. were all sympathetic towards the application, but they felt that in law they had no power other than to dismiss the motion. Thus the appeal comes to this court. I draw attention to the words of the chairman of the committee in his affidavit: "Members expressed "the view that, whatever had been done in the past, it was their "duty to consider the present application on its merits as they "saw them and that their decision must be consistent if justice "was to be done as between applicants." Mr. Davies would have us read that short statement as meaning that having refused to delete rule 3 in the case of the Pavilion Theatre the committee thought that they must do the same in regard to the Queen's

Theatre, for they must be consistent if justice was to be done between applicants.

That is not the right way of approach to the matter. Every application of this kind should be considered upon its merits; an application should not be refused merely because an earlier one on behalf of someone else had been refused. Members of a committee ought not to be afraid of someone saying: "well, they "were not consistent." Their duty is to do justice on the facts of a particular application before them.

The Divisional Court held that their hands were tied by two cases which were cited to them. The first is *Reg.* v. *West Riding of Yorkshire County Council*,[1] in which it was held that: "A "county council acting as a licensing authority for the perform-"ance of stage plays may, in the exercise of their discretion, "attach to the grant of a licence for such performances a condition "that the grantee shall undertake not to apply to the excise "authorities under 5 & 6 William 4, c. 39, s. 7, for an excise "licence to sell intoxicating liquors in his theatre." So far as the report of the case shows, no mention was made of section 9 of the Act of 1843. It may well be that the decision was arrived at under the general power to grant a licence under section 5 of the Act, and it was said by Cave J.[2]: "The propriety of "allowing the sale of liquor in a theatre may vary very much "according to the locality in which the theatre is situate, or the "character of the theatre itself. It is a matter which might "very properly be taken into consideration that there was a place "where liquor could be obtained within a few yards of this very "theatre. I cannot say that the committee have exercised their "discretion wrongly." Wills J. said[3]: "One of the grounds "upon which it is well recognized that justices may fairly refuse "a licence to a public-house is that there are already too many "public-houses in the immediate neighbourhood. There is "already a public-house within twenty yards of this theatre. If, "then, an unconditional licence were granted to the theatre, "the effect would be to multiply facilities for drinking, and it "is a neighbourhood in which it is not desirable to do so. If "that is not a good ground for the exercise of their discretion by "the committee in the way they have done, I cannot conceive "what is."

I would not have it thought that if there is an application for a new theatrical licence, the committee which has to consider the matter may not, in considering whether or not they should include rule 3 in the rules under which the house is to be conducted, look upon the neighbourhood in general and upon the other facilities for drinking which exist in the immediate neighbourhood. There may be conditions which make it desirable that they should do so. Mr. Edmund Davies submitted to this court that those matters were not relevant and ought not to be considered. In some cases it seems to me that they will be relevant, and a matter for consideration of the committee, as was said by the Divisional Court in the year 1896, and that view appears to me to have been upheld in the other case cited to the Divisional Court, *Reg.* v. *Sheerness Urban District Council*,[4] where the court held that rule 3 was not ultra vires.

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[1] [1896] 2 Q.B. 386.
[2] Ibid. 388.
[3] Ibid. 389.

A. L. Smith L.J. said[5]: "The town clerk then pointed out "rule 3 to the council, and further pointed out that the rule "stands until it is rescinded. I am of opinion that the district "council were not bound hand and foot by the resolution adopting "the rules, but did hear the facts on both sides, that is to say, "the evidence concerning the two clubs and a public house "being so near the theatre. I do not think it necessary for this "decision to discuss *Reg.* v. *West Riding of Yorkshire County* "*Council*,[6] and, furthermore, I am of opinion that the case of "*Reg.* v. *Sylvester*[7] has no application to this case, as there "the justices refused to hear any application unless the rules "had been conformed with. For these reasons I am of opinion "that the rule for a mandamus must be refused." Rigby L.J. said[8]: "I am of the same opinion, inasmuch as I do not consider "the rules ultra vires, and think the district council were bound "by them. Furthermore, it appears to me that the district "council did 'hear and determine' the application, and, there"fore, this is not a case for mandamus."

I do not think that Mr. Edmund Davies' argument to the effect that the committee are not entitled to consider the locality or the fact that there are public-houses within a short distance of the theatre is sound. But in the present case there are other matters for consideration which appear to me not to have been considered by the committee. It may be that that arises in part from the fact that they did not hear any argument or submissions. Mr. Barrett had no reason to think that there was any likelihood of a change being made in the terms of his licence. There was, so far as he knew, no opposition; in fact there had not been for a number of years. He applied in the ordinary way; he was not represented, but for some reason the committee thought that a change ought to be made. I am not sure what the reason was, unless it was that they thought that their decisions ought to be consistent in the two cases; there is certainly none shown in the affidavits of Mr. Barrett or of Mr. Davies, but the committee decided upon a change. When they came back they announced their decision; thus their decision was given without any argument and without any representation by the management of the theatre other than the fact that their manager was there and formally applied.

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[4] (1898) 62 J.P. 563, 564.

[5] Ibid. 564.

[6] [1896] 2 Q.B. 386.

[7] (1862) 31 L.J.M.C. 93.

[8] 62 J.P. 564.

Mr. Edmund Davies submitted that the committee did not hear and determine this particular application according to law. It appears to me that if a change such as this is to be made, the committee ought to state their intention, to ask the applicant if he would like to be represented, and to have argument upon the matter, and to indicate that if that was desired, they would adjourn the application until a later date. That would give an opportunity for argument, and if that course is followed in any such case, it enables the party applying to put his submissions before the committee reaches a final decision upon the matter. That would be a desirable practice. There is substance in the submission that the change was made without hearing any submissions, and that rule 3 is to be applied against the holder of the licence, a change which prevents the sale of intoxicating liquor as well as of tobacco, and which means, I should imagine, considerable loss of income, and loss of space in the house against the construction of which or management of which there has not been a word said at any time. That appears to me to make it desirable that the case should be considered again by the committee: and there are other reasons.

The affidavit by Mr. Barrett has attached to it the form of licence which is granted, and it ends with the proviso: "Provided that the said Thomas Wesley Barrett do observe and "keep rules for ensuring order and decency at and in the said "building so licensed as aforesaid, and for regulating the times "during which the said building shall be allowed to be open," a copy of which rules and recommendations are attached to the case; that is followed by a copy of the rules, of which there are 34, one or two of which were struck out. From the proviso it appears that the rules are made under section 9 of the Act, which is the section giving power to make suitable rules for ensuring order and decency.

I find it difficult to say that you promote the object of ensuring order and decency at and in the said building by including in the rules rule 3, that is by compelling anyone who wishes to have a drink to go out of the theatre, returning at some later time. I can understand that it might be an advantage in some cases, but when you have the case of a theatre which has existed since the year 1901 without complaint and in regard to which it has not been hinted that there was any lack of order and decency, I do not consider that a departure from the custom of 50-odd years in the way proposed would ensure order and decency. It was there already, and no one says to the contrary.

These matters are delegated to the committee. It is the committee's duty to consider them, and this court ought to be slow to say anything which would take away anything from the authority of the committee. At the same time if, as in this case, all the evidence points one way, and one way only, I do not think it is right, certainly it is not desirable, for a change of this kind to be made. It causes great difficulties to those who are responsible for the management of the theatre, and I cannot see how it can promote order and decency. I emphasize that there had been no complaint whatever against the management of this theatre in all the years it existed. If there was the slightest ground for complaint, I could understand it, but if a house has a record of this kind, the management ought to have some credit, and ought not lightly to be deprived of a considerable part of its income which would go, I suppose, to public-houses or licensed bars nearby, or in the other case, to those who sell tobacco and cigarettes, if people are able to buy them elsewhere after 8 o'clock.

It appears to me that the committee paid attention to the desire to be consistent, in other words, they decided to grant the same form of licence to the Queen's Theatre as they had done to the Pavilion Theatre. I do not think that the cases are in quite the same position, nor do I think that the committee ought to have imposed rule 3 on the Queen's Theatre unless in some way that rule could promote order and decency within the house, and I do not see that it could in view of the history of the house.

The further matter for consideration appears to me to be the position in regard to tobacco and cigarettes. All the members of the Divisional Court referred to this. The Lord Chief Justice said [9]: "How prohibition of the sale of tobacco has anything to "do, at any rate in these days, with decency and order, I confess "I fail to see, and if the committee had been asked at the "hearing to delete the words 'and tobacco' they might have "done so." He thought that as the committee had not been asked to deal with tobacco separately, the Divisional Court ought not to interfere. I feel that that position arose because the committee dealt with the application without any argument or submissions, and without explaining to Mr. Barrett that they were going to make a change. There was nothing to warn him of the likelihood of any change until the decision was given.

Hallett J. said [10]: "I should like to add that I share the "feeling my Lord has expressed as to the difficulty of understanding why a prohibition on selling tobacco as distinct from "smoking should now be attributed to the preservation of good "order and decency. However, that is a matter which, as my "Lord has explained, cannot be canvassed on this occasion." I do not think that is right; the applicant ought to be allowed to take the point in view of what happened before the committee. Donovan J.[11] began his judgment in this way: "I agree, with "much regret. Speaking for myself, I cannot see how order "and decency are preserved or advanced by telling the patrons "of this theatre that they can drink next door instead of in the "theatre itself," and a little later: "The result is that the "committee were entitled in law to take into account the drinking "facilities next door, though speaking for myself I feel it was a "very harsh decision to do so in this particular case in view of "the fine record this theatre had enjoyed for over fifty years, "during which time order and decency had been preserved to "everybody's satisfaction, but that is not a matter for this "court."

In one sense it is not a matter for the court, but if it be right to say that the decision of the committee was given from the point of view of what they regarded as consistency rather than looking at the facts of this case, the facts and history of the Queen's Theatre, Rhyl, I feel that it is open to the court to say that that is not the right approach to the case. Donovan J. added: "It is also, as has been pointed out by the Lord Chief "Justice, another result of the committee's decision that no "tobacco can be sold inside the theatre. You may take your

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[9] [1956] 1 W.L.R. 1423.

[10] Ibid. 1424.

[11] Ibid. 1424.

"own pipe and cigarettes in and smoke them, but you must not "buy them inside the theatre. That, of course, is a wholly "unreal and unnecessary restriction, and the committee do not "say otherwise; they do not mention it at all. But the application was to delete rule 3 as a whole, and that being so, and "since the application was, in my view, properly dealt with by "the committee, it is not possible to single out tobacco and grant "relief in respect of that alone. For the rest, I agree entirely "with what has fallen from the other members of the court." At the end of the judgment, the Lord Chief Justice, addressing Mr. Brabin, told him that he could have leave to appeal if he wanted it; thus rather inviting an appeal, and the applicant took advantage of the leave to appeal given and appealed to this court.

I do not like granting an order of mandamus against a committee of this type. I realize—at least I hope I realize—some of the reasons that prompted their action, which might perhaps be more apposite in another case than in this. It appears to me that the decision at which they arrived is somewhat of a hardship upon those who have conducted this theatre with propriety over the years, so that they themselves might well look upon it as an injustice. There were two bars in the theatre, which of course had to be kept up to date with all the necessary fitments, else some complaints would have been made. Suddenly, without any warning, they lose the right to use them.

In my view the order for mandamus should go and the committee should determine this matter afresh according to law. I do not mean to say for one moment that they have done anything which they think to be wrong in any sense. Mr. Llewellyn, who represents the committee, said that the committee did not desire to be contentious in the least in this court; they desired, as far as possible, to assist the court, and would welcome whatever views the court thought it right to state to them. No one would wish to be dictatorial. I have stated in general terms how I look upon the case, having heard what Mr. Llewellyn said as to how the committee would like this case to be treated. They at least will have the advantage of knowing that the Lord Chief Justice and the judges who sat in the Divisional Court did not find themselves in agreement with the committee's determination, though they felt unable to alter it in view of the decisions to which I have referred. I believe it to be our duty to say that the committee should consider this case again, and if they do reconsider it on the lines that I have suggested, after, of course, the views of my brethren have been expressed, they may well think right to grant the licence on the old terms, in which case I should consider that they were acting in accordance with justice, and I believe that to be what they desire. The case should go back.

JENKINS L.J. I am of the same opinion. For a matter of 55 years down to March 9, 1956, apart from a short period of rebuilding after a fire, the Queen's Theatre, Rhyl, had been continuously licensed as a theatre under a succession of licences, none of which were subject to any condition or rule against the sale of intoxicants on the premises. On March 9, 1956, the committee of the Flint County Council concerned with the matter of theatrical licences met to consider the grant of licences for an ensuing period. Mr. Barrett, the secretary of the company which owns the Queen's Theatre, and the holder of the appropriate licence on their behalf, duly attended this meeting, as a representative of the owners of the theatre had done for very many years, and made formal application for renewal of the licence, never dreaming that anything else would happen but that the licence would be renewed in the old form, with no condition or rule against the sale of intoxicants. It must have been greatly to his surprise when the committee, after retiring, returned and announced their decision in the case of the Queen's Theatre, which was to the effect that a licence would be granted for the ensuing period, but that licence would, for the first time as compared with all the many licences the Queen's Theatre had been allowed over the years, contain a rule prohibiting the sale of intoxicating liquor on the premises.

As I have said, at the date of that meeting the Queen's Theatre, apart from a short period of rebuilding after a fire, had been continuously allowed a licence in the form I have mentioned, and there had never been any shadow of complaint by anyone, or any suggestion that the premises were not properly conducted in every way. In these circumstances, this sudden reversal of policy in relation to the Queen's Theatre, after a period of more than half a century, though no doubt arrived at with the best of intentions, appears to me to have been neither reasonable nor just. Mr. Barrett applied to the Divisional Court for the order of mandamus which has given rise to the present appeal, and the Lord Chief Justice and the other judges who were members of the court on that occasion made it plain enough that they shared the view I have expressed as to the apparent injustice

C. A.
1956

REGINA
v.
FLINTSHIRE
COUNTY
COUNCIL
COUNTY
LICENSING
(STAGE
PLAYS)
COMMITTEE.
Ex parte
BARRETT.

Jenkins L.J.

and unreasonableness of the result, but they felt themselves constrained by the authorities to which my Lord has referred, that is to say, *Reg.* v. *West Riding of Yorkshire County Council*[12] and the case in this court, and therefore binding on us as on the Divisional Court, of *Reg.* v. *Sheerness Urban District Council*,[13] to reject the application.

If I may respectfully say so, I entirely agree with the members of the Divisional Court that they were bound by the *West Riding* case to hold that the proximity of other facilities for obtaining intoxicating liquor is a relevant circumstance proper to be taken into account in determining whether a licence should be granted or not, and I agree with them too that the *Sheerness* case affords authority in this court to the same effect. But, to my mind those two decisions, the second of which this court must, of course, accept as binding, do not conclude the matter against the applicant. It appears to me from the chairman's affidavit that the committee approached the application in respect of the Queen's Theatre in a wrong way.

First of all, from paragraph 8 of the chairman's affidavit, it appears that: "The committee first considered the application "relating to the Pavilion Theatre aforesaid and most of the "members of the committee were of the opinion that it was "unnecessary and undesirable to provide drinking facilities at "this theatre because there were adequate facilities already "provided at nearby licensed premises. It was decided by a "substantial majority that this application be granted but that "the said rule 3 should not be deleted from the conditions "attached to the theatrical licence for this theatre." Rule 3 was the rule about intoxicating liquor.

So far, then, the majority view of the committee was that it was unnecessary and undesirable to provide drinking facilities at the Pavilion Theatre because there were adequate facilities at a nearby licensed premises. This consideration was, on the authorities, a consideration proper to be taken into account. But when the committee passed to consider the position of the Queen's Theatre, it seems to me, with respect to them, that they are shown by the chairman's affidavit to have fallen into error. The chairman's affidavit deals thus with their deliberations upon this application: "9. The committee thereupon considered the "applicant's application and the view was expressed that the "grounds upon which the committee had refused to delete the

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[12] [1896] 2 Q.B. 386.

[13] 62 J.P. 563.

"said rule 3 from the conditions attaching to the theatrical "licence for the Pavilion Theatre aforesaid (which is situated a "short distance from the Queen's Theatre aforesaid) applied "with even greater force to the Queen's Theatre in that it was "known to members of the committee that a large hotel with "a number of bars adjoined the Queen's Theatre and that patrons "of this theatre could obtain access thereto by crossing a narrow "covered arcade. It was pointed out by me and the clerk of "the committee that the Queen's Theatre had hitherto been "granted theatrical licences with rule 3 deleted from the "conditions attached thereto, but it was felt by members of "the committee that this did not fetter their discretion in "considering the present application. Members expressed the "view that, whatever had been done in the past, it was their "duty to consider the present application on its merits as they "saw them and that their decision must be consistent if justice "was to be done as between applicants."

To my mind it was right for the committee to regard it as open to them to consider a case where an application was made for a renewal of a licence just as it would be open to them to consider an original application. That is to say, it would not be right for them to regard renewal of a licence or the grant of a new licence to a former licence-holder as a matter of course, and not as a matter calling for consideration upon its merits and for the exercise of their discretion. So far, therefore, paragraph 9 shows no ground for complaint, but it does seem to me to show that regarding the matter as open to them to decide de novo in the exercise of their discretion, the committee applied some sort of general principle to the effect that a licence without deletion of rule 3 ought not to be granted in any case whatsoever where it could be said that there were adequate facilities for obtaining liquor elsewhere. That seems to have been regarded by the committee as a matter of general principle. Then they went on to consider that they had already refused the application for the Pavilion Theatre on the ground of proximity of other sources of supply, and that the Queen's Theatre was an a fortiori case, because the alternative supply was even more conveniently situated than the supply in the case of the Pavilion Theatre, and to conclude, accordingly, that if it was right in the case of the Pavilion Theatre to refuse the deletion of rule 3, it was a fortiori right to do so in the case of the Queen's Theatre, and therefore that the Queen's Theatre licence must follow the fate of the Pavilion Theatre licence, because it was essential that the same rule should be applied in all cases, or, in other words, that the committee should be consistent.

I cannot think that that method of approach fulfils the requirement that the matter should be heard and determined according to law. It seems to me it sets up a general principle as to the effect of proximity of other premises where liquor can be obtained when the proper course is to consider each case on its merits. It seems to me that it wrongly pursues consistency at the expense of the merits of individual cases. It seems to me that notwithstanding *Sharp* v. *Wakefield*,[14] which shows that the grant of a licence by way of renewal is a matter for the exercise of discretion just as is the grant of an original licence, it cannot be right in this case wholly to ignore, as to all appearances the committee wholly ignored, so far as giving any weight to it was concerned, the circumstance that for more than half a century the Queen's Theatre had enjoyed a wholly blameless and useful existence as a theatre licensed for the sale of intoxicating liquor; or to ignore the fact that so far, as appears from the evidence, there has been no relevant change of circumstance whatsoever which could affect the committee's decision in March, 1956, as compared with their decision at an earlier period.

Accordingly, while I share my Lord's reluctance to disturb the conclusion of the committee, who, I have no doubt, performed their functions to the best of their ability and in a highly conscientious manner, nevertheless it does seem to me that they have erred in this case, and, accordingly, that it should be sent back to be heard and determined according to law. I would therefore allow this appeal.

PARKER L.J. I agree. The respondents to this motion and to this appeal carry out, as a result of the Local Government Acts of 1888 and 1933, the functions of the justices under section 5 of the Theatres Act, 1843, in regard to the granting of theatrical licences. Under that section the justices, and now the committees, have power to grant theatrical licences, and there is implied a wide discretion. Under section 9 the justices, and now the committees, have power to make suitable rules for ensuring order and decency at the several theatres licensed by them. Apparently for a long time, indeed as appears from *Reg.* v. *Sheerness Urban District Council*,[15] in regard to the County of Kent since 1890, there have been model rules, of which rule 3, with which we are concerned in the present case, was then in

[14] [1891] A.C. 173; 7 T.L.R. 389.

[15] 62 J.P. 563.

being, but as the section shows, it is for the committees in respect of each particular theatre to consider when the application is made, whether a new application or by way of renewal, which, if any, of those rules should be made applicable, and for breach of those rules penalties are laid down.

Mr. Edmund Davies' first and main contention was that when granting a theatrical licence the committee may attach only such conditions as are suitable for ensuring order and decency at the particular theatre, in other words that section 9 alone empowered the committee to lay down conditions. I cannot believe for myself that that is so; though there is no express power in section 5 to grant a licence subject to conditions, I think it is clearly implied. It seems to me that at any rate in regard to a new application as opposed to a renewal, the committee would be entitled to take into consideration the other facilities in the neighbourhood for the sale of liquor, and, if in their discretion they thought right, to impose a condition that the licensee should either not apply for an excise licence or should not sell liquor. Indeed, that as it appears to me was the decision of the Divisional Court in *Reg.* v. *West Riding of Yorkshire County Council*,[16] which was approved by this court in the *Sheerness* case.[17]

But it does not follow that it would be right to lay down any such conditions in the case where, as here, a theatre has held an unrestricted licence in regard to the sale of liquor and tobacco for very many years. It is true, as appears from *Sharp* v. *Wakefield*,[18] a case dealing with justices' licences, that the same legal considerations prevail whether the application is an original application or by way of renewal. But it is quite clear that though there may be no difference in the legal considerations, there must be a difference in regard to the facts to be considered. Indeed, Lord Halsbury, in his speech in that case, said[19]: "My "Lords, I am very far indeed from saying that, assuming the "complete discretion that I have indicated to exist, it would be "likely that the persons exercising it would consider an original "application in the same way as one which was applied for by "the person who has already been licensed for one year. Of "course, the justices would remember that a year before a "licence had been granted and presumably (unless some change "during the year was proved) they start with the fact that the "topics to which I have referred have already been considered,

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[16] [1896] 2 Q.B. 386.
[17] 62 J.P. 563.
[18] [1891] A.C. 173.
[19] Ibid. 181.

"and one would not expect that those topics would be likely to "be reopened, unless, as I say, some change has been proved. "This would be likely to limit the inquiry to the conduct of the "house and the character of the licensee, and, perhaps, the "condition of the house, but as matter of fact and not as "matter of law at all."

In the present case, however, it is conceded that there was no evidence of and no suggestion that there had been any change of circumstance, any change in the facilities in the locality or in regard to the character of the neighbourhood generally. Indeed, as my Lords have said, the basis of the decision arrived at by the committee was that it would be only right that there should be consistency between the applicants, and having decided that there was to be a restriction in the case of the Pavilion Theatre, it was thought right to impose a restriction also in regard to the Queen's Theatre.

In any event, so far as this case is concerned, the condition prohibiting the sale of liquor and tobacco was not made as a condition of the granting of the licence under section 5 of the Act of 1843; in other words, it was not imposed as a result of the committee's discretion under that section; the prohibition was made and imposed pursuant to section 9 of the Act, and in regard to that section the discretion of the committee is within narrow limits in that the rules or conditions laid down shall be only those which are suitable, albeit not necessary, for ensuring order and decency at the several theatres licensed by them.

There was no complaint made at any time as to the way the theatre or the bars in the theatre were managed, and for my part I would agree entirely with Donovan J.'s opening remarks when he said[20]: "I agree, with much regret. Speaking for myself, "I cannot see how order and decency are preserved or advanced "by telling the patrons of this theatre that they can drink next "door instead of in the theatre itself." In other words, as it seems to me, there was no evidence at all on which the committee could impose the prohibition on the sale of liquor in the form of a rule under section 9.

One final word in regard to the sale of tobacco. It may well be that in 1890 or earlier, when these model rules were made, it was thought that smoking in a theatre was not becoming, in other words, that it was contrary to decency, and it may be that not only was smoking prohibited in the theatre, but it was thought right to prevent the sale of tobacco in the theatre as

[20] [1956] 1 W.L.R. 1424.

C. A.
1956

REGINA
v.
FLINTSHIRE
COUNTY
COUNCIL
COUNTY
LICENSING
(STAGE
PLAYS)
COMMITTEE.
Ex parte
BARRETT.

well, but today I for my part can see no possible reason for saying that it is necessary in order to preserve decency and order to say that tobacco should be prohibited while at the same time the patrons can bring all the tobacco and cigarettes they like and smoke them in the theatre.

For these reasons, as well as for those given by my Lords, I would allow this appeal.

Appeal allowed.
Order for mandamus granted.

Solicitors: *George Thatcher & Son for J. Kerfoot-Roberts, Son & Griffiths, Holywell; Sharpe, Pritchard & Co. for W. Hugh Jones, Mold.*

A. W. G.

CENTRAL NEWBURY CAR AUCTIONS LTD. *v.* UNITY FINANCE LTD. AND ANOTHER. MERCURY MOTORS, THIRD PARTIES.

C. A.
1956
Oct. 4, 5, 8;
Nov. 15.

Denning, Hodson and Morris L.JJ.

[Plaint No. M. 30.]

Sale of Goods—Nemo dat quod non habet—Estoppel—Motor-car—Car and registration book handed over to professed intending buyer—Subsequent fraudulent sale—Claim for damages by true owner against buyers—Whether true owner estopped—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 21 (1).
Estoppel—Conduct, by. Road Traffic—Registration book.

On November 4, 1955, the plaintiffs' motor saleroom was visited by a personable stranger giving the name of C., who expressed a wish to buy a second-hand Morris car. It was agreed that the plaintiffs should sell the car to a finance company who would let it on hire-purchase to "C." "C." signed proposal forms for submission to the finance company, and, contrary to the agreement between the plaintiffs and the finance company, was allowed to take away the car and its registration book, leaving behind in part exchange a Hillman car, which was later found to be on hire-purchase. The Morris car, which the plaintiffs had purchased at an auction, was then registered in the name of one A., who had not signed the book. The book contained a warning that "The person in whose name a "vehicle is registered may or may not be the legal owner of the "vehicle."

On November 7 a personable stranger, giving the name of A., took the car to the third parties' garage and offered it for sale, the purported signature of A. being then in the book. The third

C. A.

1956

CENTRAL NEWBURY CAR AUCTIONS LTD. *v.* UNITY FINANCE LTD.

parties bought the car, and later sold it to the first defendants, a hire-purchase company, who let it to the second defendant. In an action for damages for conversion, the defendants pleaded that the plaintiffs were estopped[1] from denying the authority of C. to sell the car, as they had permitted him to take possession of the car and registration book without having made any or any sufficient inquiries:—

Held (by Hodson and Morris L.JJ., Denning L.J. dissenting), that by entrusting the car to C. together with a document which clearly stated that it did not prove legal ownership, the plaintiffs were not making any representation that C. was entitled to deal with the car as his own, so as to estop them from asserting their own title.

Per Denning L.J., dissenting. Although there was no estoppel by representation, the plaintiffs were estopped by their conduct in that they intended to part with the car and had armed C with the car and registration book and thus enabled him to dispose of the car.

Lickbarrow v. *Mason* (1787) 2 Term Rep. 63; *Farquharson Bros. & Co.* v. *King & Co.* [1902] A.C. 325; 18 T.L.R. 665 considered.

APPEAL from Judge Kirkhouse Jenkins, sitting at Newbury County Court.

The following statement of facts is taken substantially from the judgment of Denning L.J.

In July, 1947, a new Morris car was registered with the Dorset County Council with the index number CFX 805 and a registration book was issued for it. In October, 1948, the first change of ownership was registered. It remained thenceforward in the same ownership until January 23, 1955, when the car was sold to one C. Ashley of 11, Beaulieu Road, Christchurch. It was then registered with the Hampshire County Council in the name of C. Ashley. The space in the log book for "2nd change" was filled in with Ashley's name and address with the date stamp "January 22, 1955," against the entry, stamped this time by the Hampshire County Council. Ashley did not sign his name in the space provided for the purpose, and neither of the two previous owners had done so.

In September, 1955, Ashley put the car into a sale by auction at Southampton, when it was bought by a dealer for £278. The dealer was John Rolls, acting on behalf of the Central Newbury Car Auctions Ltd. (hereinafter called the Newbury

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[1] Sale of Goods Act, 1893, s. 21: "(1) Subject to the provisions of this "Act, where goods are sold by a per-"son who is not the owner thereof, "and who does not sell them under "the authority or with the consent of "the owner, the buyer acquires no "better title to the goods than the "seller had, unless the owner of the "goods is by his conduct precluded "from denying the seller's authority "to sell."

Auction Co.). This company took possession of the car and the registration book: but they did not register themselves as the owners. There is no need for a dealer to register a transfer to himself, so long as he is holding the car only for resale and is intending to use it only with trade plates. In that case he need not send in the registration book or fill in a "change" space, but he ought to notify the council that he holds the car. This is a considerable advantage to a dealer because it means that the registration book contains the names of fewer owners and is more valuable on that account. So Ashley's name still remained in the book as if he was the latest owner. The Newbury Auction Co. held the car and the registration book until November 4, 1955, when a distinguished-looking stranger arrived at their showroom, wanting to buy a car. He came in a Hillman Minx car and offered to leave it in part exchange. Rolls showed him the Morris which he had in stock, and it was eventually arranged that he should take the Morris on hire-purchase terms, and leave the Hillman in part exchange. He gave his name as Cullis. In order to carry out the transaction, the Newbury Auction Co. got Cullis to sign forms for hire-purchase whereby a finance company, South Western Securities Ltd., would buy the Morris car from the Newbury Auction Co. for £337 10s. 0d. and let it on hire-purchase to Cullis. In calculating the instalments, a finance charge of £40 10s. 0d. had to be added to the price of £337 10s. 0d., making £378 in all, less £112 10s. 0d. allowance for the Hillman in part exchange, giving a net amount of £265 10s. 0d. payable by Cullis by 24 monthly instalments. Cullis signed a "proposal "form" in which he offered to enter into a hire-purchase agreement with the finance company. In that form he gave his permanent address as 32, Grange Road, Swindon, Wilts., and his employer's name as Franklin, Cromwell Street, Swindon. In addition, the secretary of the Newbury Auction Co. signed a "dealer's statement" in which they agreed to sell the car to the finance company for £337 10s. 0d., the property to pass as soon as the finance company accepted the proposal, credit to be given for the £112 10s. 0d. The dealer's statement also contained the words "We recommend the proposed hirer who has completed "the proposal form as being a suitable and responsible person "to enter into the proposed hire-purchase agreement . . . "Delivery of the vehicle has not been made to the proposer and "will not be made to the proposer except on your instructions. "It is further agreed that this transaction shall be upon a pro "forma basis only until you notify us of your acceptance." The reference to a "pro forma" basis is to be explained by the fact that, in addition to those two documents, two further documents were signed in anticipation of the deal going through. One was a form of hire-purchase agreement signed by Cullis. The other was a form of receipt for the car signed by Cullis. They would not be effective until the finance company accepted the proposal. To use the words of Rolls himself: "Forms are tentative "pending the transaction going through. The finance company "can refuse or accept."

The Newbury Auction Co., having got those forms signed and the Hillman car in their possession, did not wait to see if the finance company accepted the proposal. They straightway let Cullis have the Morris car and the registration book applicable to it. He drove off with the car and the log-book and they never saw him again. The Newbury Auction Co. sent the documents off by post that night to the finance company. The very next morning the finance company telephoned to say that they thought Cullis was bogus. The address he gave in Swindon was fictitious. There was no such address. They refused, of course, to accept the proposal. The Newbury Auction Co. tried to get in touch with the employers, but they were also fictitious. The Newbury Auction Co. then told the police. They also made inquiries about the Hillman Minx car which Cullis had left with them; and they discovered that it was not his to sell. It was on hire-purchase. They paid £100 to the lender so as to get it clear for themselves. The judge found that Cullis was a swindler and that the statements made by him were a tissue of lies.

Three days later, on November 7, 1955, a man driving the Morris car called at the Mercury Garage at Birkenhead, many miles from Newbury. He was probably Cullis, but he did not give that name. He gave the name of Ashley, which was the name shown in the registration book as the latest owner. He had signed "C. Ashley" in his own handwriting in the space provided for the purpose. He produced the registration book and explained that he wanted to sell the car. The manager of the Mercury Garage tested the car. He also took steps to see if the car was on hire-purchase. There is a convenient machinery set up by the trade for ascertaining this. The finance companies have established a Hire-Purchase Information Service where they keep a register of every car which is on hire-purchase. Whenever a dealer wants to know if a car is on hire-purchase, he only has to telephone his finance company and they will tell him almost at once. In this case, the manager of the Mercury Garage ascertained within an hour that there was no hire-purchase on the Morris. He took the man's word that he was Ashley (the latest owner in the registration book) and agreed to buy the car for £200. He took delivery of the car and the log-book, and he gave the man a crossed cheque for £200 in favour of C. Ashley and got a receipt from him for the money. The man returned later, however, with a plausible request asking the manager to open the cheque. The manager had noticed that the signature "C. Ashley" on the receipt was the same as the last signature on the log-book. He thought that verified his identity. The man had also a vanload of furniture outside and said he was moving into the district, which engendered confidence. So the manager opened the cheque. He cancelled the crossing and the man got £200 from the bank. He has not been seen since. Mercury Motors afterwards sold the Morris car to Unity Finance Ltd., who let it on hire-purchase terms to Powell.

When the Newbury Auction Co. found out what had happened to the Morris car, they claimed that it still belonged to them and that they were entitled to have it back. When it was not returned, they brought an action against the Unity Finance Company and Powell for damages for conversion of it; and those defendants brought in Mercury Motors as third parties. The value of the Morris has been agreed at £240.

By their defence the defendants pleaded, inter alia, that the plaintiffs were estopped from denying the authority of Cullis to sell the Morris car, in that they "permitted the said Frank Cullis "who was a stranger to them to take possession of the said "motor-car and its registration book without having made any "or any sufficient inquiries about the said Frank Cullis and "before he was accepted as a hirer by a hire-purchase company."

The county court judge gave judgment for the defendants. The plaintiffs appealed.

J. T. Molony Q.C. and *Eric Stockdale* for the plaintiffs. The judge found that the plaintiffs had been culpably negligent, and that their conduct amounted to a representation that the thief had authority to sell the car. The defendants rely on an estoppel under section 21 (1) of the Sale of Goods Act, 1893; but to satisfy that subsection a representation must be made by an owner with the knowledge that some person will act on it; there is no case in which a simple act of entrustment has created an estoppel.

A car registration book is not a document of title: *Joblin* v. *Watkins & Roseveare (Motors) Ltd.*[2] It was laid down in *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*[3] that the mere possession by a person of a document of title does not establish that he has authority to dispose of the goods to which the document refers; a fortiori when the document in question is not a document of title. [Reference was also made to *Heap* v. *Motorists' Advisory Agency*,[4] *Farquharson Bros. & Co.* v. *King & Co.*[5] and *Jerome* v. *Bentley & Co.*[6]]

There is nothing in the book amounting to a representation by the plaintiffs; their name does not even appear, so that they could not be taken to be making a representation to anyone. The absence of a registration book is a ground for suspicion, but its presence only makes the possession of a car similar to the possession of any other chattel which passes by delivery.

The book contained no representation by the plaintiffs and no indication of title. The purpose of the book is to indicate who is responsible for paying the tax, and it states expressly that the person in whose name the car is registered may not be the legal owner. The absence of a book is cause for suspicion if it is sought to sell a car and puts the buyer on inquiry: see *per* Denning L.J. in *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.*[7]; similarly such a sale is not one "in the "ordinary course of business" within section 2 (1) of the Factors Act, 1889: see *Pearson* v. *Rose & Young Ltd.*[8] But while the absence of a book is a grave defect, its presence does not carry the matter further than the possession of an ordinary chattel. It is not even indicia of title. [Smith's Leading Cases, vol. 2, pp. 785 et seq. was referred to.]

Stockdale following. The judge criticized the plaintiffs on the ground that what they had done was outside the "usual course "of business" in the motor trade, but there was no evidence before him as to what that was. In any event, it is usual to trust an honest-looking customer, particularly when he gives in part payment some article of substantial value.

George Bean and *Hugh Trenchard* for the defendants. The respectability of the customer is no excuse; all confidence tricksters are well dressed. The plaintiffs did not deal with the book as the licensing regulations require; they left it in blank, and so made possible the fraud perpetrated, and by handing it over to the customer impliedly gave him authority to fill in the blank. The car plus the registration book in blank are better than a negotiable instrument, for they can be exchanged for cash through any second-hand dealer in the country. The plaintiffs were also negligent in failing to check the Hillman with the Hire-Purchase Institute, which would at once have put them on inquiry. If they are successful, a second-hand dealer will be relieved from the necessity to take any precautions at all. That would be disastrous for the motor trade. The courts are not intended to act as debt collectors for negligent dealers.

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[2] (1948) 64 T.L.R. 464; [1949] 1 All E.R. 47.

[3] [1938] A.C. 287; 54 T.L.R. 208; [1938] 1 All E.R. 52.

[4] [1923] 1 K.B. 577; 39 T.L.R. 150.

[5] [1902] A.C. 325; 18 T.L.R. 665.

[6] [1952] 2 T.L.R. 58; [1952] 2 All E.R. 114.

[7] [1949] 1 K.B. 322, 338; 65 T.L.R. 66; [1949] 1 All E.R. 37.

[8] [1951] 1 K.B. 275; 66 T.L.R. (Pt. 2) 886; [1950] 2 All E.R. 1027.

[HODSON L.J. These books are nothing more than tax documents.]

They are vital to the everyday running of the country and an important part of all transactions in the motor trade.

Estoppel by conduct arises from the neglect of some duty owed to the public. The plaintiffs owed a duty to the public in general who might deal with this car. They failed in that duty by equipping "Cullis" with indicia of title and disposing power, and should be estopped from denying his right to deal with the vehicle. *Jerome* v. *Bentley & Co.*[9] is distinguishable, for there there was nothing which the true owner of the ring could have done or refrained from doing in order to safeguard his position. *Farquharson Bros. & Co.* v. *King & Co.*[10] is also distinguishable, for there the person was a trusted servant, and the master could not be held responsible, for he could not be expected to take all possible precautions against a trusted servant; here the fraudulent person was a stranger. Again, the *Mercantile Bank* case [11] is distinguishable, for there the bank servants were acting in accordance with the usual practice, and the fraudulent person was of the highest standing, and it was held that there was an absence of anything amounting to a neglect of the usual precautions. [*Henderson & Co.* v. *Williams* [12] and *Abigail* v. *Lapin* [13] were also referred to.]

Molony Q.C. in reply. This case must be decided by reference to principles and not by weighing up the respective morals and demerits of the parties involved. The principle of law is that

[9] [1952] 2 T.L.R. 58.

[10] [1902] A.C. 325.

[11] [1938] A.C. 287.

[12] [1895] 1 Q.B. 521.

[13] [1934] A.C. 491.

a person who has no title to a chattel cannot confer a title on someone else; that principle has been subjected to exceptions, some of which have been made by Parliament; and after Parliament has intervened in specific cases to establish those exceptions (e.g., in the Factors Act and the Sale of Goods Act), it may reasonably be assumed that all cases requiring such intervention have been covered, and that they cover a wide variety of relationships occurring in the course of ordinary commercial intercourse. But this case is the exceptional case of larceny and does not occur every day in the course of normal trading relationships. When it does, it has the important consequence that as the man in possession is a thief with no title except the apparent legal possession, the true owner cannot be deprived of his title. The thief with the car and the registration book is in no better position than any other dishonest person disposing of stolen property. Such books can be stolen as easily as motor-cars. They are not negotiable instruments nor documents of title, nor in the category of indicia of title. They contain on their face the warning that the person registered therein may not be the legal owner of the car which it accompanies.

Henderson & Co. v. *Williams*[14] and *Abigail* v. *Lapin*[15] are distinguishable, for there is a great difference between an agent who exceeds his authority and a thief who has no authority to do anything in the way of "disposing power." The contention that it would be contrary to the interest of the motor trade that dealers should be able to assert their ownership in circumstances like the present is based on the assumption that the motor trade is ready to sell cars to persons whose honesty may be suspect. But this is a special case. Most similar transactions are financed by hire-purchase companies, as this was, and there is nothing in the book to show that such companies are the true legal owners. The results of dismissing this appeal would be disastrous, for it would involve the risk that in all cases where a person is in possession of the car and the book he may be able to represent himself as the true owner so as to defeat the hire-purchase company's title. The old principle of "nemo dat quod non habet" is worthy to be and ought to be upheld, and nothing in the authorities cited requires the court to depart from it in the present case.

Cur. adv. vult.

[14] [1895] 1 Q.B. 521.

[15] [1934] A.C. 491.

November 15. The following judgments were read.

DENNING L.J., after stating the facts: The judge found that the Newbury Auction Co. had been guilty of culpable negligence in letting Cullis have the Morris car and the log-book. He said: "The plaintiffs trusted Cullis implicitly and were the victims of "an impudent confidence trick, but the plaintiffs were, however, "most casual and negligent in their conduct of the business . . . "Rolls (their director) was casual in the extreme and gave no "thought to the possibility of the Finance Company rejecting "the proposal . . . It is difficult to imagine such a reckless "proceeding . . . It is difficult to imagine a worse example of "culpable neglect in a commercial transaction than that of "delivering a car with the registration book." He thought that their conduct was such as to estop them from asserting that the Morris car still belonged to them. He therefore gave judgment for the defendants. I should point out, however, that the judge thought that Mercury Motors were not as prudent as they might have been. He said that it would have been prudent for the manager to persist in giving a crossed cheque or at least in postponing the transaction for a day or two, but he acted in good faith and had no suspicion of fraud.

This case raises the ever-recurring question: which of the two innocent persons is to suffer by the fraud of a third? It is the familiar contest between the original owner who had been deceived into parting with his property, and the innocent purchaser who has been deceived into buying it. The original owner relies on the general principle that no man can acquire a title to a chattel from anyone who has himself no title to it: whereas the innocent purchaser says that the original owner is estopped from asserting that principle against him. The innocent purchaser says that the original owner has taken so large a part in enabling the rogue to dispose of the property that he should not be heard to deny the purchaser's title to it. In other words, the owner is precluded by his conduct from denying the rogue's authority to sell within the meaning of section 21 of the Sale of Goods Act, 1893. The judge has held in this case in favour of the innocent purchaser. The original owner appeals to this court.

Seeing that here we are considering the doctrine of estoppel by conduct, I would like to state the basis of it. It is this: you start with an innocent person who has been led to believe in a a state of affairs which he takes to be correct (in this case the purchaser has been led to believe that the rogue was the owner of the car) and has acted on it. Then you ask yourself how has this innocent person been led into this belief. If it has been brought about by the conduct of another (in this case by the conduct of the original owner), who, though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it. In so stating the basis of estoppel by conduct, I am relying on the well-considered analysis by the Chief Justice of Australia, Sir Owen Dixon (then Dixon J.), in *Thompson* v. *Palmer*[1] and *Grundt* v. *Great Boulder Proprietary Gold Mines Ltd.*[2] His formulation of the principle is the most satisfactory that I know. As he points out, the basis of estoppel is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which another has taken to be correct. But the law does not leave the question of fairness or justice at large. It has defined with more or less completeness the kind of participation by a party which will suffice to work an estoppel against him. They are to be found in the decided cases. Often it is a representation made by him which he is not allowed to controvert. But a representation is not the only basis of estoppel. Conduct too is a recognized head. We are here concerned with the conduct of a true owner in letting a chattel out of his possession. The question is what conduct on his part is regarded by the law as so serious that it would be unfair or unjust to allow him afterwards to claim it from an innocent purchaser.

To the question thus posed, I answer that on the authorities the mere fact that the true owner is careless in the custody of his goods or in the indicia of title to his goods is not sufficient to prevent him afterwards asserting his title to them. If he leaves his house wide open so that thieves enter and steal his goods, he can recover them from any person into whose hands they come, unless they have been sold meanwhile in market overt. If he entrusts his servant with the custody of goods, and the servant turns dishonest and sells them to outsiders, the true owner can recover them, no matter that he was careless in trusting the servant so far. The cases of *Farquharson Bros. & Co.* v. *King & Co.*[3] and *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*[4] fall into that category. In those cases the delivery orders and railway receipts were, in Lord Wright's words, "no

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[1] (1933) 49 C.L.R. 507, 547.

[2] (1937) 59 C.L.R. 641, 675.

[3] [1902] A.C. 325; 18 T.L.R. 665.

[4] [1938] A.C. 287; 54 T.L.R. 208; [1938] 1 All E.R. 52.

"more significant for this purpose than the possession of the "goods would have been." Applying those cases to illustrations put in argument, I would say that if the true owner carelessly leaves his log-book in his car and a thief steals both car and log-book—or if he entrusts both car and log-book to his servant for some purpose, for example, so as to get the licence renewed, and the servant turns thief and sells them—then the true owner can recover them from anyone into whose hands they come.

Likewise at common law, the mere fact that the true owner consents to someone else being in possession of his goods or of the indicia of title to the goods is not sufficient to prevent him afterwards asserting his title to them (see *Johnson* v. *Credit Lyonnais Co.*[5]) unless he deposits them with an agent or broker so as to clothe him with apparent authority to dispose of them: see *Fuller* v. *Glyn, Mills, Currie & Co.*[6] This rule of the common law was thought by Parliament to be too favourable to the true owner. It has therefore been modified by the Factors Act, 1889, s. 2 (9), and the Sale of Goods Act, 1893, s. 25. There is a lesson to be learnt from this. The courts, in favouring the original owner at the expense of the innocent purchaser, have run counter to the needs of a commercial country. As Scrutton L.J. has pointed out, "The history of the Factors Acts is restriction of their language by the courts in favour of the true owner, "followed by reversal of the courts' decisions by the legislature": see *Folkes* v. *King*.[7] It is common ground that those Acts do not apply to this case.

In all the cases of which I have spoken so far, the true owner has only been careless in the custody of his goods or has only consented to another having possession of them. He has not done anything to part with the property in them. Herein lies an important distinction. It is one thing to part with possession of your goods. It is quite another to part with the property in them. If a man is induced to part with the property in his goods or with the power of disposing of them, then even though he is induced thereto by the fraud of a rogue, he cannot afterwards avoid the transaction as against an innocent person who takes in good faith and for value: see *Moyce* v. *Newington*.[8] The technical reason sometimes given is because fraud makes a transaction voidable and not void; but the real reason is because the owner intended to part with the property in the goods, or has behaved as if he so intended. It may be that he only intended to pass the property in the goods conditionally on being paid or on some other condition, but nevertheless he cannot recover them from the innocent purchaser. It would be unjust to allow him to do so when he intended to part with the property in them and has armed the rogue with the goods or the means of disposing of them. He may have made some private conditions or reservations, but they cannot affect an innocent purchaser who has no knowledge of them. The owner has behaved as if he intended to pass the property and must take the consequences.

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[5] (1877) 3 C.P.D. 32.

[6] [1914] 2 K.B. 168; 30 T.L.R. 162.

[7] [1923] 1 K.B. 282, 306; 39 T.L.R. 77.

[8] (1878) 4 Q.B.D. 32.

In so stating the law I have had in mind the classic distinction between obtaining goods by false pretences and larceny by a trick. It has long been accepted that if the goods have been obtained from an owner by false pretences, he cannot recover them from an innocent purchaser: whereas if they have been obtained by larceny by a trick he can. And the distinction between the two is that in obtaining by false pretences the owner intends to part with the property in the goods whereas in larceny by a trick he only intends to part with the custody or possession. The cases show that if a person, through the fraudulent representation of another, delivers to him a chattel, intending to pass the property in it to him or to someone else (*Rex* v. *Atkinson* [9]), or to give him power to pass the property in it at the present or some future time, conditionally or unconditionally (*Folkes* v. *King*,[10] *per* Bankes L.J.[11] and *per* Scrutton L.J.[12]) the fraudulent person cannot be indicted for larceny but only for obtaining the chattel by false pretences. I realize that in the criminal law the distinction between false pretences and larceny has ceased to be of practical importance because, on a charge of one, a man may now by statute be convicted of the other. But the distinction is a real one which has its parallel in the civil law.

Apart altogether from the criminal law about false pretences, the cases show that if a man intends to part not only with the possession of goods but also with the property in them or the power of disposing of them—or behaves as if he had that intention by arming the recipient with all the documents necessary to that end—he is not entitled to recover them from an innocent purchaser. It is this explanation which underlies such decisions as *Lickbarrow* v. *Mason*,[13] *Babcock* v. *Lawson*,[14] *Henderson &*

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[9] (1799) 2 East P.C. 673.

[10] [1923] 1 K.B. 282.

[11] Ibid. 293–296.

[12] Ibid. 306–308.

[13] (1787) 2 Term Rep. 63.

[14] (1878) 4 Q.B.D. 394.

Co. v. *Williams* [15] and *Commonwealth Trust* v. *Akotey.*[16] A close analogy in land law is to be found in *Abigail* v. *Lapin.*[17] I would say a word about *Commonwealth Trust* v. *Akotey,*[18] which has sometimes been criticized. It should be read with the companion case next to it in the Law Reports, *Nanka-Bruce* v. *Commonwealth Trust.*[19] The justice of the decision then becomes apparent. In the one case the owner parted with the property to the rogue. In the other case he behaved as if he had. In each case the innocent purchaser was held to be protected. It would be deplorable if in the one case the innocent purchaser was protected and the other not. It would, as the Privy Council said, bring confusion into mercantile transactions and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow* v. *Mason.*[20]

Applying these principles to the present case, I think it is quite plain that when the Newbury Auction Co. handed the Morris car to Cullis they intended to part with all their property in it. Not to Cullis, of course, but only to the finance company, but that makes no difference. They intended to part with the property just as much as if they agreed to sell it to Cullis. They intended, of course, that the transaction should go through on hire-purchase terms: but that only meant that the sale was in law to the finance company, not to Cullis. The " dealers' statement " which they signed shows that they intended that the property should pass " as soon as the finance company accepted " the proposal." That condition about the finance company's acceptance was a private condition or reservation which did not derogate from the intention of the Newbury Auction Co. to part with the property. It did not enter their heads that the finance company would refuse to accept the proposal. They assumed without question that the finance company would accept. That is why they handed over the car and log-book to Cullis without any thought of seeing him again. They did not verify his address. They did not even ask him where he was going. Once he left their showrooms he was gone beyond trace. So were the Morris car and log-book. I do not suppose they would have dreamt of letting him have it but for the fact that they had got the Hillman in part exchange. They had the Hillman in their hands and they meant to keep it. Just as they intended to take the property in the Hillman unto themselves, so at the same time they intended to part with the property in the Morris. Even now they do not mean to part with the Hillman or give any credit for it. If they are right in their claim in this action, they will recover the Morris car—or what comes to the same thing, its full value—and they will keep the Hillman as well: and Mercury Motors will be worse off by £200. That does not seem to me to be right. I know that the Hillman is not worth as much as the Newbury Auction Co. thought it was, because it was on hire-purchase and they had to pay £100 to clear it, but they could have found that out beforehand if they had telephoned to the Hire-Purchase Information Service. At any rate, it was worth something and they are so much the better off for having it.

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[15] [1895] 1 Q.B. 521; 11 T.L.R. 148.

[16] [1926] A.C. 72; 41 T.L.R. 641.

[17] [1934] A.C. 491.

[18] [1926] A.C. 72.

[19] [1926] A.C. 77.

[20] 2 Term Rep. 63.

This case seems to me to bear a striking resemblance to the recent decision of the Lord Chief Justice in *Eisinger* v. *General Accident, Fire and Life Assurance Corporation Ltd.*,[21] where the owner handed over a car and log-book to a distinguished-looking stranger in return for a worthless cheque. The only difference is that in that case there was a sale to the rogue himself and here there was a sale on hire-purchase. There the rogue passed a worthless cheque. Here he signed a worthless hire-purchase form. Lord Goddard C.J., in that case, said: "You cannot "say that the claimant has lost the car: what he has lost is the "proceeds of sale." So here you cannot say that the Newbury Auction Co. lost the Morris car. What they lost was the money they expected to receive from the finance company; and that was entirely their own fault because they parted with the car when they ought not to have done. It should be remembered that in the "dealer's statement" they told the finance company that they would not deliver the car to Cullis except on the instructions of the finance company. Yet they did deliver it, and by so doing effectively debarred themselves and the finance company from any hold over it. This shows that they did not intend to reserve any property in themselves. They intended to hand over the car to Cullis beyond recall in the expectation that they would get their money from the finance company. At any rate, if they had not got that intention, they behaved as if they had.

The point is brought home by the fact that they handed over the log-book to Cullis. Everyone knows that the log-book is good evidence of title: see *Pearson* v. *Rose & Young Ltd.*[22] The wise owner keeps it at home or in a place separate from the car.

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[21] [1955] 1 W.L.R. 869, 871; [1955] 2 All E.R. 897.

[22] [1951] 1 K.B. 275; 66 T.L.R. (Pt. 2) 886; [1950] 2 All E.R. 1027.

Thieves who steal cars know it well enough. Hence the devices to which the criminal courts become accustomed. If a thief wishes to dispose of a stolen car, not having its log-book, he will get hold of the log-book of some other car and alter the number of the stolen car to conform with the number in the log-book, or he will alter the number in the log-book to correspond with the number of the car. To dispose of a car without the log-book is as difficult as to dispose of land without the title deeds. In each case the thief must resort to forgery if he wishes to get rid of it to an innocent person. The Newbury Auction Co. must have been aware of the importance of the log-book. They must have known that when they handed both car and log-book over to Cullis they were arming him with complete dominion over it, subject only to the rights of the finance company which they assumed would come into force but which were not in fact then in force, as they well knew. They clearly intended to reserve no dominion over the car themselves.

How, then, does the matter stand? An innocent purchaser, who buys both car and log-book, acts on the assumption that the seller is the owner of them. That is a very reasonable assumption to make, at any rate when the purchaser has checked and found that it is not on hire-purchase. Unbeknown to the purchaser, the seller is a rogue. It would be unfair and unjust to allow the original owner to go behind that assumption when he himself intended to part with the property in the car—or at any rate behaved as if he intended to part with it—and has armed the rogue with both car and log-book, and thus enabled him to dispose of them.

It is said, however, that the original owner owed no duty to the innocent purchaser. I do not agree. When the original owner handed over the car and log-book to a complete stranger, intending to part with the property in them, he ought to have foreseen the possibility that the stranger might try and dispose of them for his own benefit to someone or other. That is what does happen when you hand over goods to a stranger reserving no right to yourself. The original owner owed a duty to any person to whom the stranger might try to dispose of them. The case comes within the words of Lord Wright in the *Mercantile Bank of India* case[23]: "The duty may be, in the words of "Blackburn J.: 'to the general public of whom the person is "'one' . . . His identity may be ascertainable only by the "event, in the sense that he has turned out to be the member

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[23] [1938] A.C. 287, 304.

"of the general public actually reached and affected by the "conduct, negligence, representation or ostensible authority." Here the innocent purchaser was affected, not by any representation by the original owner, but by his conduct. And that is sufficient to work an estoppel.

I would dismiss the appeal.

HODSON L.J. The plaintiffs' claim is for damages for conversion of a motor-car. In the event of the claim succeeding damages have been agreed at £240.

By their amended defence, the first defendants have alleged that the plaintiffs, by their conduct, are estopped from denying the authority of one Frank Cullis to sell the car in question because they permitted him, being a stranger to them, to take possession of the car and its registration book without having made any or sufficient inquiries about him and before he was accepted as a client by a hire-purchase company.

This defence succeeded before the county court judge, who gave judgment against the plaintiffs on the ground that this plea was established.

The facts were as follows: In September, 1955, the plaintiffs bought the car, a Morris, for £278 and received the registration book therewith.

On page 3, in the column headed "Name and address of the "person registered with the council whose date stamp is affixed "hereto as the person keeping the vehicle the particulars of "which are given on page 7," there appears this entry: "2nd "change, C. Ashley, Bonniebrae, 11 Beaulieu Road, Christ-"church" followed by the signature "C. Ashley." In the same space is the date stamp of the Hampshire County Council, dated January 22, 1955.

The probabilities are, though there is no specific evidence of this, that the date stamp and the whole of this entry except the signature, were on the book at the time of the purchase in September, 1955.

On November 4, 1955, a man who was a complete stranger to the plaintiffs, giving his name as Frank Cullis, arrived at the plaintiffs' showroom in Newbury at about 4.30 p.m. in a Hillman car.

A deal was arranged on the terms that Cullis would hand over the Hillman to the plaintiffs at a price of £110 and the plaintiffs would sell the Morris to a finance company, and the hire-purchase company would enter into a hire-purchase agreement with Cullis. Cullis signed a proposal form addressed to the finance company giving the necessary particulars, including his address, which he gave as 32, George Road, Swindon, and that of his employers. Both of these pieces of information turned out to be false. Cullis was not the owner of the Hillman and disappeared, having been permitted by the plaintiffs to drive the Morris away and to take the registration book with it.

Cullis had also signed an undated printed memorandum of agreement between the finance company and himself whereby the company purported to sell the Morris car to the hirer upon the terms contained in the agreement. He also signed a receipt for the Morris car dated November 5, 1955. These forms were prepared by the plaintiffs in his presence in anticipation of the transaction going through.

The transaction fell through because the finance company discovered that Cullis was a rogue; but the plaintiffs had trusted Cullis. There was no contractual relationship between the plaintiffs and Cullis and they were the victims of larceny by a trick.

The plaintiffs had a good title to the Morris car and simply permitted Cullis to drive it away and take the registration book with him.

The subsequent history of the matter is that on November 7 a man driving a Morris car, no doubt the man who had called himself Cullis three days earlier, arrived at the Mercury Garage, Birkenhead, now passing under the name of Ashley, produced the registration book (presumably having himself signed "C. "Ashley" in the appropriate space) and sold the car to the Mercury Garage for £200 in cash. The car was sold to the Unity Finance Company, the first defendants, who entered into a hire-purchase agreement with the second defendant, whose name appears now on the registration book in the space reserved for 3rd change.

The plaintiffs rely on the maxim "Nemo dat quod non habet."

The question for determination was thus stated by the county court judge: what representation did the plaintiffs make by the unconditional delivery of the car together with the registration book to a stranger?

First it is to be noticed that the registration book is not a document of title as defined by section 1 (4) of the Factors Act.

C. A.
1956

CENTRAL NEWBURY CAR AUCTIONS LTD.
v.
UNITY FINANCE LTD.

Hodson L.J.

1889. This was pointed out by Croom-Johnson J. in *Joblin* v. *Watkins & Roseveare (Motors) Ltd.*[24]

An examination of the book shows that its primary purpose is to show who is the person liable to pay the road fund licence tax in respect of the vehicle. On pages three and four there is a column headed "Name and address of the person registered with "the council whose date stamp is affixed hereto as the person "keeping the vehicle the particulars of which are given on "page 7," and at the foot of each of those pages in leaded type appear these words: "Important. The person in whose name a "vehicle is registered may or may not be the legal owner of the "vehicle."

It is true, as Croom-Johnson J. pointed out, that in the motor trade a wise purchaser of a car asks that the registration book may be handed over too as it is usually some evidence of bona fides unless the vendor has stolen both car and book at the same time. Since the keeper of the car is specifically instructed to keep the book in a safe place not in his car, a stolen car will not normally be accompanied by the registration book.

This point was emphasized in *Pearson* v. *Rose & Young Ltd.*[25] (a case arising under the Factors Act, 1889), where the decision of the court was that a mercantile agent dealing with a car without the book was not dealing in the ordinary course of business.

The mere handing over of a chattel to another does not create an estoppel and there will be no estoppel unless the doctrine of ostensible ownership applies, as for example, when the owner gives the recipient a document of title or, as has often been said, invests him with the indicia of ownership.

This doctrine was first applied by a common law court to a commercial transaction by Ashhurst J., who pronounced in *Lickbarrow* v. *Mason*[26] the famous dictum: "We may lay it "down as a broad general principle, that, wherever one of two "innocent persons must suffer by the acts of a third, he who has "enabled such third person to occasion the loss must sustain it."

This dictum has been said to be too wide for general application. See the observations of Lord Lindley in *Farquharson Bros. & Co.* v. *King & Co.*,[27] where he pointed out that it could not be relied upon without considerable qualification. The noble Lord thought that the word "enable" introduced an element of error.

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[24] (1948) 64 T.L.R. 464; [1949] 1 All E.R. 47.

[25] [1951] 1 K.B. 275.

[26] 2 Term Rep. 63, 70.

[27] [1902] A.C. 325, 343.

Lord Halsbury, in the same case,[28] speaking of the word "enabled" as used by an American judge (Savage C.J.) in like context, said: "in one sense every man who sells a pistol or a "dagger enables an intending murderer to commit a crime; but "is he, in selling a pistol or a dagger to some person who comes "to buy in his shop, acting in breach of any duty?"

As Donovan J. pointed out in *Jerome* v. *Bentley*,[29] everything depends on the construction of the word "enabled" in the dictum of Ashhurst J., for if I carelessly leave my front door open so that a thief walks in and steals my silver I have in a sense enabled him to steal it by not locking my door; but that does not prevent my recovering it from some innocent purchaser from the thief otherwise than in market overt.

In *Lickbarrow* v. *Mason*[30] the facts were that an unpaid vendor of goods shipped them to the purchaser and indorsed to him the bill of lading. The purchaser transferred the bill of lading to a sub-purchaser and became insolvent before the arrival of the goods. The vendor asserted a right to stop the goods "in transitu" but it was held that he could not assert this right against the sub-purchaser because by his conduct in endorsing over the bill of lading to the purchaser the vendor had enabled the purchaser to represent himself as the owner of the goods and so to deceive the sub-purchaser.

The word "enabled" was therefore not apparently used in any extended sense by Ashhurst J.

It is said that the negligence of the plaintiffs in parting with the registration book was a breach of a general duty owing to the whole of the public or at any rate that section of it who might become purchasers of motor-cars for, as Blackburn J. said in *Swan* v. *North British Australasian Co.*,[31] there "must be the "neglect of some duty that is owing to the person led into that "belief, or, what comes to the same thing, to the general public "of whom that person is one, and not merely neglect of what "would be prudent in respect to the party himself, or even of "some duty owing to third persons, with whom those seeking "to set up the estoppel are not privy."

This conception of duty was accepted by the Privy Council in *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*,[32] where the topic of estoppel was discussed at length.

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[28] [1902] A.C. 332.

[29] [1952] 2 T.L.R. 56; [1952] 2 All E.R. 114.

[30] 2 Term Rep. 63.

[31] (1863) 2 H. & C. 175, 182.

[32] [1938] A.C. 287.

C. A.

1956

CENTRAL NEWBURY CAR AUCTIONS LTD. *v.* UNITY FINANCE LTD.

Hodson L.J.

The plaintiffs do not deny that by negligently allowing the registration book to fall into the hands of the thief they facilitated his fraudulent conduct, but they deny that they were in breach of any duty owing to the general public any more than the man who leaves his house unlocked, as in the example given by Donovan J.

In my judgment the case fell to be determined not upon a consideration of negligence but upon what is the nature of the representation made by the delivery of the registration book. The book itself is not a document of title; its terms negative ownership and it contains no representation by the plaintiffs or anyone else that the thief was entitled to deal with the car as his own.

I think that Mr. Molony was right in saying that while a person in possession of a chattel may reasonably be thought to be the owner when he offers it for sale, the case of a person in possession of a motor-car does not differ in kind although the absence of the registration book detracts from the signification of possession.

The case is entirely different where, as in *Henderson & Co.* v. *Williams*,[33] in the words of Lord Halsbury: "There may be a "question where, although no property had in fact passed, yet "the true owner has allowed another person to hold himself out "as the owner in such a way as to make an innocent person "enter into a contract, which contract being performed cannot "be set aside."

An interesting example of the application of the same doctrine appears in the case of *Abigail* v. *Lapin*,[34] a case dealing with a conflict of equities.

The Privy Council rejected the view of the majority and accepted that of the minority of the High Court of Australia. In the dissenting judgment of two members of the High Court of Australia, Gavan Duffy and Starke JJ., there is found this passage[35]: "'In our opinion, the Lapins are bound by the "'natural consequences of their acts in arming Olivia Sophia "'Heavener with the power to go into the world as the absolute "'owner of the lands and thus execute transfers or mortgages "'of the lands to other persons, and they ought to be postponed "'to the equitable rights of Abigail . . .'"

Applying the principle to the facts of this case, I cannot say that the plaintiffs armed the thief with the power to go into the world as the absolute owner of the Morris motor-car. The handing over of the registration book had no such effect.

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[33] [1895] 1 Q.B. 521, 525; 11 T.L.R. 148.

[34] [1934] A.C. 491.

[35] Ibid. 499.

Rimmer v. *Webster*[36] is another example. That was a case where certain stock had been transferred to a broker by the owner with instructions to sell it, but the broker abused his position as transferee of the stock in order to borrow money for his own purposes on its security.

Sir George Farwell held that the borrower's equity must prevail, thus stating the principle[37]: "when . . . the owner is found "to have given the vendor or borrower the means of representing "himself as the beneficial owner, the case forms one of actual "authority apparently equivalent to absolute ownership, and "involving the right to deal with the property as owner, and any "limitations on this generality must be proved to have been "brought to the knowledge of the purchaser or mortgagee."

This decision was approved by the Privy Council in *Tsang Chuen* v. *Li Po Kwai*,[38] and also in *Abigail* v. *Lapin*.[39]

In my opinion, in this case the plaintiffs did not give the thief the means to represent himself as the owner of the Morris car by handing him a document which stated the precise opposite.

Similarly, *Fuller* v. *Glyn, Mills, Currie & Co.*,[40] discussed by the Privy Council in *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.*,[41] was a case where the plaintiff had left share certificates in the hands of the stockbrokers. The certificates were in the name of the person from whom the plaintiff had bought the shares and bore upon them an indorsed form of transfer executed by the seller. The stockbrokers used the certificates to obtain an advance for themselves. On their bankruptcy the plaintiff claimed the certificates from the pledgees but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it and, if produced to a third person, calculated to convey to that third person that such an authority existed.

Such cases lend no authority, in my view, for the proposition that a car registration book, if produced to a third person, is calculated to convey to that person that authority exists to deal with the car as owner.

I would allow the appeal.

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[36] [1902] 2 Ch. 163; 18 T.L.R. 548.

[37] [1902] 2 Ch. 163, 173.

[38] [1932] A.C. 715.

[39] [1934] A.C. 491.

[40] [1914] 2 K.B. 168.

[41] [1938] A.C. 287.

MORRIS L.J. The plaintiffs were undoubtedly the owners of a Morris car and the question arises whether as a result of any of the events that occurred they have been deprived of their ownership. Being utterly deceived by an apparently trustworthy man calling himself Cullis, they gave him possession of the car. Cullis was not going to buy the car from the plaintiffs; the project was that the car would be sold by the plaintiffs to a hire-purchase company from whom Cullis would hire. In these circumstances it is not suggested that the provisions of section 9 of the Factors Act, 1889, or of section 25 of the Sale of Goods Act, 1893, became applicable. Nor is it suggested that Cullis was a mercantile agent or that section 2 of the Factors Act applies.

The situation is not, therefore, governed by the decision in *Pearson* v. *Rose & Young Ltd.*[42]

The Morris car was later sold by someone to Mercury Motors in Birkenhead. Whether such person was Cullis, then calling himself Ashley, or was someone else who called himself Ashley, he had no sort of right or authority to sell. There was no sale in market overt as in *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.*[43] How, then, is it said that Mercury Motors acquired a title to the car? Nemo dat quod non habet. It is said that the plaintiffs are "precluded from "denying" the authority of such person, whoever he was, to sell. Section 21 (1) of the Sale of Goods Act, 1893, provides: "Subject to the provisions of this Act, where goods are sold by "a person who is not the owner thereof, and who does not sell "them under the authority or with the consent of the owner, the "buyer acquires no better title to the goods than the seller had, "unless the owner of the goods is by his conduct precluded from "denying the seller's authority to sell."

Now it is clear that the person who purported to sell the Morris car to Mercury Motors was not the owner of the car and he did not sell it under the authority or with the consent of the owner. The suggestion is therefore that if possession of a car and of its registration book is given to someone who has no authority to sell, but who wrongly purports to sell, the true owner may lose his ownership. Perhaps, however, the suggestion is more limited and should be stated as being that if an owner negligently gives possession of a car and of its registration book to someone who has no authority to sell but who wrongly purports to sell, the true owner may lose his ownership. But the element of negligence so introduced involves and implies a duty to take care and to be circumspect in regard to one's own property. That in turn raises the question as to whom the duty is owed. So as to cover every potential purchaser it must therefore be asserted that the owner owes a duty to the whole world.

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[42] [1951] 1 K.B. 275.

[43] [1949] 1 K.B. 322; 65 T.L.R. 66; [1949] 1 All E.R. 37.

What is said in the present case is that the plaintiffs gave Cullis possession both of the car and of the registration book and were negligent in so doing: it is said, therefore, that because of their conduct in being negligent they are precluded from denying that Cullis had any authority to sell. In other words, it is said that they cannot be heard to say to the defendants that Cullis had no right to sell. Why? Not because they were deceived by Cullis into letting him have the car—but because they also let him have the registration book. This must involve that if A gives to B possession of A's car with its registration book, A cannot be heard to say that he has not given to B an "authority to sell." This proposition seems to me to be far-reaching and to involve giving to a registration book a significance which it does not possess.

When Cullis presented himself at Birkenhead he was a complete stranger to Mercury Motors. They accepted what he said to them. They believed that he was Mr. Ashley, who was selling his own car. They, of course, did not know that the car belonged to the plaintiffs and had no sort of thought of the plaintiffs in their mind. There was no question of any kind of representation from the plaintiffs. Mercury Motors proceeded to buy because they were duped by Cullis. Cullis would not have had the registration book but for the decision of the plaintiffs to allow him to have it, but, so far as Mercury Motors were concerned, they merely had what Cullis said to them, coupled with the fact of his physical possession of the car and the registration book. If the plaintiffs are to be precluded from denying Cullis's authority to sell, it seems to me that it must be because of the mere circumstance that they gave possession of the book as well as the car to Cullis. If they had given the car and book to Cullis in circumstances which involved no criticism upon them and without any carelessness, the situation would have been exactly the same so far as Mercury Motors are concerned. Therefore, it seems to me that the plaintiffs should only lose their ownership or be precluded from asserting it if it can be said that by parting with their car and its registration book they endowed the possessor of these with an apparent authority to sell. The proposition must be that though no apparent authority to sell can be assumed from mere possession of a car, nor from mere possession of a car registration book, the possession of a car with its book carries an apparent authority to sell. If Mercury Motors can assume that Cullis had a right to sell because Cullis had the car and its book, then it seems immaterial whether the plaintiffs put Cullis into possession because they were deceived without any carelessness on their part or because they were deceived and were in some ways careless. It cannot be that ownership is lost on the basis of enduring punishment for carelessness. The improvident householder who has left a window open at night which gives easy access for a thief is not in a worse position in asserting ownership of stolen articles than is the cautious householder who has checked the secure closing of his house.

It is doubtless true that criticism, particularly when available in the light of after events and after acquired knowledge, can be levelled against the plaintiffs. But it hardly seems entirely appropriate that the criticism should come from the Birkenhead purchasers. Are the plaintiffs to be estopped by negligence while the purchasers may be negligent with impunity? Nor does it seem fitting to weigh in the balance the respective criticisms of the actions of the parties and to see in which direction the scales are tipped. The particulars of negligence in this case were pleaded as follows: "Further the plaintiff company is estopped "from denying the authority of one Frank Cullis to sell the said "Morris motor-car by reason of the following facts: Particulars "of conduct raising estoppel: The plaintiff company permitted "the said Frank Cullis who was a stranger to them to take "possession of the said motor-car and its registration book without "having made any or any sufficient inquiries about the said Frank "Cullis and before he was accepted as a hirer by a hire-purchase "company."

It is certainly correct that the plaintiffs did give Cullis possession of the car and the book without checking the truth of what he told them and before he was accepted as a hirer by a hire-purchase company. They made the mistake of being deceived by a plausible trickster. The evidence was that Cullis appeared "distinguished"; he was well spoken and well dressed. His talks with Mr. Rolls lasted for half an hour. He had brought with him a Hillman car which he said was his own and which he left with Mr. Rolls: he purported to sell it in part exchange. (The evidence in regard to this car is incomplete. The evidence does not show whether a registration book for it was handed over.

The car was in fact on hire-purchase but the evidence does not show who was the hirer. The evidence is that Mr. Rolls had later to pay £100 to a finance company in respect of it. As there is no mention of having to pay anyone else or of having to deal with anyone else, the inference would appear to be that Cullis was the hirer of the car.) But if the plaintiffs are to be criticized for being deceived by Cullis and for not verifying what he said, it seems to me that similar criticism could apply against Mercury Motors. When " Cullis " went to see them he called himself Mr. Ashley. The evidence of Mr. Clarke of Mercury Motors was that the man was " distinguished looking—not a man you would " take to be a crook." Mr. Clarke did make an inquiry as to whether the Morris car was on hire-purchase. But no inquiry was made as to whether the man really was Mr. Ashley. He was unknown to Mercury Motors, and they made no inquiries about him. They were impressed by his distinguished appearance just as the plaintiffs had been a few days earlier. " Mr. Ashley " said that he was selling the car because he had incurred expenses in moving and he gave as his new abode an address in Wallasey that could not have been far distant. No inquiry was made as to whether " Mr. Ashley " was moving to that address. So convincing was " Mr. Ashley " that he persuaded Mr. Clarke to buy the car for £200, and when Mr. Clarke wrote a crossed cheque for that amount " Mr. Ashley " further persuaded him to make it an open cheque. So " Mr. Ashley," a complete stranger, left a car which did not belong to him and soon after went on his way the richer by £200 in cash.

If Mr. Clarke had not been deceived, just as Mr. Rolls was, it may be that " Mr. Ashley " or " Cullis " might not have wished much longer to retain the car; he might have feared that a look-out for it might be kept.

I doubt whether either Mr. Rolls or Mr. Clarke ought to be judged too harshly because they were equally deceived by a man who seemed distinguished. But for the reasons that I have given it does not seem to me that a decision in this case depends upon the question whether Mr. Rolls was careless in parting with the car and the book, but depends rather upon the result and effect of his so acting.

The argument that the plaintiffs must lose their property because they were careless depends upon a line of reasoning which was rejected in *Farquharson Brothers & Co.* v. *King & Co.*[44] Lord Macnaghten said: " The real defence is a singular one. It

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[44] [1902] A.C. 325, 335.

"comes to this: The defendants say to the plaintiffs, 'You, "'Messrs. Farquharson, have conducted your business in such "'an unbusinesslike way that you ought not to have your own "'goods back again. This misfortune common to you and to us "'is all your fault. By your foolish confidence in Capon, and "'by the written authority you gave him, you "enabled" him "'to commit this fraud upon us. And so Ashhurst J.'s famous "'dictum comes in and you must sustain the loss.'" Lord Macnaghten proceeded to say that the defence had "no foundation in principle or authority." The "famous dictum" was, of course, that of Ashhurst J. in *Lickbarrow* v. *Mason*,[45] "that "wherever one of two innocent persons must suffer by the acts "of a third, he who has enabled such third person to occasion "the loss must sustain it." Lord Lindley in *Farquharson's* case[46] described this as being "far too wide." Mercury Motors, through Mr. Clarke, purported to buy because the man they saw said that he was Mr. Ashley and because he had a car and a registration book referable to Mr. Ashley. The plaintiffs had dealt with "Cullis" and, believing that he would hire a car that had belonged to a Mr. Ashley, they gave him advance possession of the car and book in the belief that the transaction would go through. The plaintiffs never expected that Cullis would ever say that he was Ashley and never authorized him to do so or to make any representation or to sell. But by giving Cullis the car and book they did in fact facilitate the perpetration of fraud by Cullis upon Mercury Motors. This resulted, however, merely from their permitting Cullis to have possession of the book and car. The question is, therefore, whether by giving Cullis possession they have clothed him with apparent authority to sell. It is clear that Cullis in fact possessed no authority to sell. The question becomes one as to whether by entrusting him with the car and the book they have in effect made a representation which they are precluded from denying that the possessor of the car and book was vested with authority to sell.

If Cullis had had the car alone, it is not suggested that authority to sell could be assumed. If the owner of a car gives mere possession of it to another (not being a mercantile agent or a purchaser) he does not hold out or represent that other person as being entitled to sell. Is the position any different if the registration book is also handed over? This raises the question as to the nature of such a book. It is necessary for mechanically propelled vehicles to have an excise licence before they are used

[45] 2 Term Rep. 63, 70.

[46] [1902] A.C. 325, 342.

on public roads. These licences are issued by county councils (or county boroughs). When a licence is issued or renewed duties of excise are payable. When a licence is first issued it is the duty of the county council (or county borough) to register the vehicle and to assign a registration mark (see Vehicles (Excise) Act, 1949, s. 16). Registration books are issued " in respect of the " registration " (see section 16 (2) (c)). The licence which is issued must be fixed to and exhibited on the vehicle in manner prescribed by regulations (see section 9 (3)). A registration book must be produced by the " owner " for inspection upon the request of a police officer or local taxation officer.

Under the Road Vehicles (Registration and Licensing) Regulations, 1955 (S.I. 1955, No. 1664), " owner " means the person by whom the vehicle is kept and used, and the expression " ownership " is to be construed accordingly. It is the " owner " who obtains a licence and pays the duty and is issued with a registration book.

It is clear that the person who is registered with the council as the " owner " of a car is not necessarily the legal owner—though he may be. The " owner " is the person by whom the vehicle is kept and used. Accordingly the register which is kept by councils does not purport to be a register which records the names of the legal owners of cars: the councils will not know who are the legal owners. In conformity with all this a notice in clear print appears on registration books as follows: " Important. " The person in whose name a vehicle is registered may or may " not be the legal owner of the vehicle."

Regulations provide (see S.I. 1955, No. 1664, reg. 9) for what is to happen upon a transfer of the vehicle. The registration book must be handed to " the transferee or other new owner." The old " owner " must at once notify the appropriate council giving certain prescribed particulars. The new " owner " or transferee must at once notify the council giving certain prescribed particulars, and if he intends to use the vehicle upon roads repairable at the public expense he must before using it insert his name and address in the registration book and deliver it to the council. He may have had the licence transferred to him, but otherwise must obtain one. If a current licence is transferred and then expires, the transferee or new " owner," if he intends to renew the licence, must apply. There are special provisions if these can be used by a transferee under a trade licence.

The result, as it seems to me, is that it cannot be assumed that the person in possession of a car and its registration book is the owner of the car. The absence of a registration book when a car is being sold will naturally give rise to much inquiry. The existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership. When the plaintiffs reposed confidence in Cullis and gave him possession of their car with its book they did not make a representation to those who had any dealings with "Cullis" that "Cullis" owned the car.

When the man calling himself Mr. Ashley presented himself at the Mercury Motors in Birkenhead, those who dealt with him were deluded into believing that he was Mr. Ashley. The man, for all they knew, might have been Mr. Ashley or he might not. Though the car was not on hire-purchase, Mr. Ashley, the registered person, might not have been the legal owner at all. The man who went to the garage might have been someone who had been given possession of the car and book without being entitled to part with them. The man might have been merely a thief of the car and book.

In my judgment the Birkenhead purchasers, who acted with a measure of speed that was doubtless brought about by their induced belief in the respectability of the man they saw, cannot acquire more than that man was able to pass to them. They may have acted as others might have done in the circumstances, but they took a risk. Because they were deceived by a confidence trickster they did not think that they were taking a risk. If the plaintiffs had merely given Cullis the car it is not suggested that there would have been a representation to all the world that the possessor of the car was its legal owner, nor can such a representation be established because possession was also given of a book which does not prove legal ownership and which proclaims a clear warning and intimation that it does not.

For these reasons I do not consider that the plaintiffs were estopped from proving their ownership, and in my judgment they were entitled to succeed against the defendants. That being so, the parties have agreed that the liability should be in damages which have been agreed at £240.

I would allow the appeal.

Appeal allowed.

Solicitors: *Leader, Henderson & Leader for Gardner, Leader & Co., Newbury; Hamlins, Grammer & Hamlin for F. S. Moore & Price, Birkenhead.*

F. R. D.

[BRISTOL SUMMER ASSIZES.]

REGINA *v.* KEMP.

1956
June 27.

Devlin J.

Criminal Law—Insanity—McNaghten Rules—Disease of the mind—Arteriosclerosis—Physical disease causing temporary lapse of consciousness—Whether a defect of reason—Trial of Lunatics Act, 1883 (46 *&* 47 *Vict. c.* 38), *s.* 2 (1).

The accused was charged with causing grievous bodily harm to his wife. It appeared that he suffered from arteriosclerosis or hardening of the arteries and that, although this disease had not reached a stage at which he displayed any general sign of mental trouble, it led to a congestion of blood in the brain (a well-recognized consequence of the disease) causing a temporary lapse of consciousness in which state the attack was made:—

Held, that in these circumstances the defect of reason under which the accused was labouring so as not to know the nature and quality of the act he was doing arose from a "disease of the mind" within the Rules laid down in *M'Naghten's Case* (1843) 10 Cl. & Fin. 200; sub nom. *McNaughton's Case,* 4 St.Tr.(N.S.) 847.

Per curiam. The condition of the brain is irrelevant and so is the question whether the condition of the mind is curable or incurable, transient or permanent. There is no warranty for introducing these considerations into the definition in the McNaghten Rules. Temporary insanity is sufficient to satisfy them. The words "disease of the mind" are in the Rules for some purpose, obviously, but the prime thing is to determine what is admitted here, namely, whether or not there is a defect of reason. In my judgment the words "from disease of the mind" are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin, a distinction which in 1843 was probably little considered. They were put in for the purpose of limiting the effect of the words "defect of reason." A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law. But the rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power.

Regina v. *Charlson* [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859 distinguished.

TRIAL ON INDICTMENT.

The accused, Albert Kemp, was charged on indictment with causing grievous bodily harm to his wife, Rosetta Kemp, with intent thereby feloniously to murder her, contrary to section 11 of the Offences against the Person Act, 1861.

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

1956

REGINA
v.
KEMP.

For the purpose of the judgment on the legal submissions the following facts were assumed where they were not admitted: The accused was an elderly man of excellent character who lived with his wife, to whom he was devoted. During one night he made an entirely motiveless and irrational attack upon his wife, striking her with a hammer with such violence as to cause a grievous wound.

The accused suffered from a physical disease, namely, arteriosclerosis or hardening of the arteries, which had not then reached a stage at which he displayed any general sign of mental trouble. Apart from a depression, not an irrational depression, produced by his poor state of health, there were no signs at all of mental trouble.

It is a well-recognized consequence of arteriosclerosis that it may lead to a congestion of the blood in the brain due to a sudden rise of blood pressure. As a result of such a congestion the accused suffered a temporary lapse of consciousness, so that he was not conscious that he picked up the hammer or that he was striking his wife with it. In that mental condition he was not responsible for his actions.

There is no general medical opinion upon what category of diseases ought properly to be called diseases of the mind, but it was agreed that arteriosclerosis can in time produce a degeneration of the brain cells by interfering with their blood supply. In the case of the accused, however, the disease had not progressed so far and it was merely a transient up~~set of~~ the blood to the brain that caused the temporary state of unconsciousness in which the attack was made.

In these circumstances it became necessary to determine whether the accused was suffering from a "disease of the mind" within the meaning of the rules laid down by the judges in *M'Naghten's Case* [1] so as to be subject to the provisions of section 2 (1) of the Trial of Lunatics Act, 1883.[2]

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[1] (1843) 10 Cl. & Fin. 200, 207 (sub nom. *McNaughton's Case*, 4 St.Tr.N.S. 847):—"Your Lordships "are pleased to inquire of us, "secondly, 'What are the proper "'questions to be submitted to the "'jury, where a person alleged to be "'afflicted with insane delusion res- "'pecting one or more particular "'subjects or persons is charged with "'the commission of a crime (murder, "'for example), and insanity is set "'up as a defence?' And, thirdly, "'In what terms ought the question "'to be left to the jury as to the "'prisoner's state of mind at the time "'when the act was committed?' And "as these two questions appear to us "to be more conveniently answered "together, we have to submit our "opinion to be, that the jurors ought "to be told in all cases that every

[2] See p. 401.

Arthur Michael Lee for the Crown. The accused having adduced evidence that he was not responsible for his acts, it is open to the Crown to adduce evidence through Dr. Fenton in rebuttal that the accused was suffering at the time from melancholia. But on the evidence of the doctors called by the accused he was insane within the meaning of the McNaghten Rules. On that evidence the accused was admittedly suffering from a defect of reason. The object of the limitation imposed upon the words "defect of reason" by the words "from disease of the mind" in the McNaghten Rules was to prevent an accused from escaping the consequences of an otherwise criminal act by relying upon his own natural or brutish stupidity. In 1843 the modern distinction between diseases having a mental or a physical origin was little known, and the distinction should not be made now.

Norman Skelhorn Q.C. and *Kenneth Bain* for the accused. It is not disputed that the accused did not know what he was doing when he made the attack on his wife. He was in a state of, at most, semi-consciousness, which no doubt amounted to a defect of the reason. If the medical evidence adduced for the accused be accepted, however, it is clear that this defect of reason cannot have been due to a disease of the mind, since this evidence shows that the accused was not suffering from any such disease but from a purely physical one. The case, therefore, falls within

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"man is to be presumed to be sane, "and to possess a sufficient degree of "reason to be responsible for his "crimes, until the contrary be proved "to their satisfaction; and that to "establish a defence on the ground of "insanity, it must be clearly proved "that, at the time of the committing "of the act, the party accused was "labouring under such a defect of "reason, from disease of the mind, as "not to know the nature and quality "of the act he was doing, or, if he "did know it, that he did not know "he was doing what was wrong . . . "If the accused was conscious that "the act was one which he ought not "to do, and if that act was at the "same time contrary to the law of "the land, he is punishable . . ."

[2] Trial of Lunatics Act, 1883, s. 2: "(1) Where in any indictment "or information any act or omission "is charged against any person as an "offence, and it is given in evidence "on the trial of such person for that "offence that he was insane, so as "not to be responsible, according to "law, for his actions at the time "when the act was done or omission "made, then, if it appears to the "jury before whom such person is "tried that he did the act or made "the omission charged, but was "insane as aforesaid at the time when "he did or made the same, the jury "shall return a special verdict to the "effect that the accused was guilty of "the act or omission charged against "him, but was insane as aforesaid "at the time when he did the act or "made the omission.

"(2) Where such special verdict is "found, the court shall order the "accused to be kept in custody as a "criminal lunatic, in such place and "in such manner as the court shall "direct till Her Majesty's pleasure "shall be known; . . ."

NOTE: These provisions replaced similar provisions contained in section 1 of the Criminal Lunatics Act, 1800.

the principle in *Regina* v. *Charlson*[3] and the accused is entitled to an acquittal.

DEVLIN J. (in his judgment on the legal submissions). It is apparent in this case that when I come to charge the jury it will be necessary for me to direct them as a matter of law upon what I take to be the true meaning and effect of the McNaghten Rules, as to which I have heard divergent arguments from counsel for the Crown and the accused. I think, therefore, that it is convenient, having heard those arguments, that I should state now what my ruling is going to be and give my reasons for it, so that when counsel come to address the jury they will know what is the law as I have declared it to be.

The facts of the case in relation to which this point has to be considered are that the accused, who is charged with causing grievous bodily harm to his wife, struck her during the night with a hammer with such violence as to inflict a grievous wound. The accused is an elderly man of excellent character and he and his wife have always been thought to be a devoted couple, and it seems that there is strong evidence to show that the act was entirely motiveless and irrational. I say strong evidence to show, though that is a matter which the jury will have in due course to decide: for the purpose of my ruling I assume that in accordance with the evidence to which I have referred, the act was committed, as the doctors on all sides think it was, while the accused was in a mental condition which made him not responsible for his actions. Their view upon this—and all three are agreed—is that he did the act, as he says he did, not knowing anything about it and that he has not any real memory of it. It is not merely a question of his striking his wife when in some mental derangement, not appreciating that what he was doing was wrong; it is a case in the view of all three doctors in which he was not conscious at the time that he did the act, that he picked up the hammer or that he was striking his wife with it.

In those circumstances if the case is determined upon the ordinary presumption that a man is sane, if that presumption continues to govern the case and if the jury accept the evidence to which I have referred, they would have to return a verdict of not guilty on the basis that the man was not responsible for his acts and did not know what he was doing and therefore could not have the necessary guilty intent. That, indeed, was what happened in a case where the facts were somewhat similar,

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[3] [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859.

Regina v. *Charlson*,[1] to which I have been referred. In that case the doctors were apparently agreed that the accused was not suffering from any disease of the mind which would render him insane at the time of the commission of the acts. This case is different, because here the doctors are not so agreed, and the question that I have to determine, which was not considered in that case, is what is meant by "disease of the mind" within the meaning of the McNaghten Rules.

Under the common law this question would not have arisen. In the eyes of the common law if a man is not responsible for his actions he is entitled to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or to any other cause. That position in common law was altered by statute, the Trial of Lunatics Act of 1883, which introduces what I think is best called a qualified form of acquittal as distinguished from the absolute acquittal, which is all that is known in common law, an acquittal which is expressed in the verdict of guilty but insane, but which has been held to be a verdict of acquittal and to mean in effect not guilty because insane. As a result of that qualified verdict the accused is detained in strict custody until Her Majesty's pleasure be known, and he is sent to some institution where his mental state can be assessed and considered; in the case of an absolute acquittal the prisoner, of course, is entitled to be discharged. The object of the Act, no doubt, was that people who committed crimes of violence, even though they were not responsible for their actions, ought not to be allowed to go free because they might commit an act of violence again, and so they ought to be kept in custody until their position should be determined. It is that Act which now governs the matter and which makes a dividing line, as it were, between those sorts of lack of responsibility which would give rise to a complete acquittal, such as complete drunkenness, for example, and those other sorts that fall within the terms of the Act permitting only the qualified form of acquittal to which I have referred. I have to decide into which category this case falls.

The Act of 1883, s. 2 (1), provides: [His Lordship read section 2 (1) and continued:] The material words are: ". . . it "is given in evidence on the trial of such person for that offence "that he was insane, so as not to be responsible, according to "law, for his actions at the time when the act was done."

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[1] [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859.

Insanity is not a legal term and there is no such thing as a legal definition of insanity. I think it is useful to note that under section 2 of the Criminal Lunatics Act, 1800, which contains a similar provision in relation to unfitness to plead, insanity has been given a very wide meaning indeed. By section 2 of that Act: " . . . if any person indicted for any offence shall be insane, " and shall upon arraignment be found so to be by a jury lawfully " impannelled for that purpose, so that such person cannot be " tried upon such indictment . . . it shall be lawful for the court " before whom any such person shall be brought to be arraigned " . . . as aforesaid to direct such finding to be recorded, and there- " upon to order such person to be kept in strict custody . . ." That Act follows the pattern of the one I have to consider. One is insanity where he cannot be tried and the other is such insanity that he cannot be held responsible for his acts. In the case of the Act of 1800 it has been held that a deaf and dumb person was not fit to plead and had to be regarded as insane for the purposes of the Act.

The Act of 1883 speaks of responsibility and contains no definition of insanity. One has therefore to look at the way in which the common law treats insanity, because the Act states that he is to be insane, so as not to be responsible, according to law, for his actions, and the tests of responsibility according to law that have been laid down are those laid down in the McNaghten Rules. They are the tests, therefore, that I have to apply in considering whether or not the Act of 1883 applies. The words of the rule are very familiar. " To establish a defence " on the ground of insanity, it must be clearly proved that, at " the time of the committing of the act, the party accused was " labouring under such a defect of reason, from disease of the " mind, as not to know the nature and quality of the act he was " doing, or, if he did know it, that he did not know he was doing " what was wrong."

In this case it is conceded that everything in that definition applies here, except for " disease of the mind." It is conceded that the accused was labouring under a defect of reason; it is conceded also that he did not know the nature and quality of the act he was doing; it is conceded also that there was something wrong with his mind (and, of course, if there was a defect of reasoning that must be so), but it is submitted that what was wrong with his mind was not any disease of the mind and that what he did was simply due to a condition of his mind, not amounting to a disease, and therefore not within the Rule. If that is so, then he is entitled to be tried on the assumption that he is sane and if his responsibility for his act is not proved by the Crown he is entitled to be found not guilty.

It is common ground on the evidence that the accused was suffering from a physical disease, namely, arteriosclerosis, or hardening of the arteries. It had not reached—and this, I think, is clear from the evidence, at any rate I assume so for this purpose—the stage at which the accused was showing any general sign of mental trouble. Apart from a depression, not an irrational depression, produced by his poor state of health, there were no signs of mental trouble. How, therefore, did he get into a condition of unconsciousness or irresponsibility when he committed this act?

Dr. Fenton, who has given evidence for the Crown, expresses the opinion that this physical disease induced a mental condition of melancholia and that it was as a result of this that the accused committed the act. Melancholia is accepted as being a disease of the mind for the purposes of this case and Dr. Fenton's evidence, therefore, if acceptable to the jury, would establish that the accused was undoubtedly suffering from a disease of the mind; but that is not the view of the two other doctors who have given evidence.

Dr. Campbell, the accused's own practitioner, who was called by the Crown, and Dr. Gibson, who was called for the accused, say that this disease, arteriosclerosis, led to a congestion of blood in the brain and that that is a well-recognized consequence of hardening of the arteries. They say that as a result of that congestion the accused suffered a temporary lapse of consciousness, either a complete loss or a clouding of it, which made him act irrationally and irresponsibly. It was the view of Dr. Gibson that that is not a disease of the mind. The way in which it was put in his evidence was this. He agreed that it could become a mental disease and said that a sufficient degree of physical degeneration makes it a mental disease, but, he said, in the earlier stages there is only a transient upset of blood to the brain. In time you get degeneration of the brain cells and then the patient becomes steadily worse, but he said that this man was not at that stage; he was simply suffering from a temporary congestion of blood due to a sudden rise of blood pressure. Congestion affects the understanding for the time being, and he agrees that the accused was suffering from a temporary disturbance of the faculty of understanding. The distinction is, therefore, a distinction of degree or stage. In Dr. Gibson's view the effect

1956

REGINA
v.
KEMP.

Devlin J.

at this stage was simply a defect in the vessels or the arteries supplying the blood to the brain, and that is to be contrasted with degeneration of the cells of the brain, which arrives at a later stage and a stage which the accused had not yet reached. Degeneration of the cells of the brain would, in his view, be disease of the mind, but a mere temporary cutting off of the supply of blood to the brain is not such. That, therefore, is the conflict between the medical evidence on both sides.

If the jury were to accept the evidence of Dr. Fenton there is no doubt that they ought to return a special verdict of guilty but insane. The question that I have to consider is how should I direct them in the event of their accepting the evidence of Dr. Gibson? Is his evidence really material to the issue that they have to determine, or does his evidence establish that, whatever may be the true medical explanation of it, what the accused suffers from is a disease of the mind within the true meaning of the McNaghten Rules?

I shall say by way of commencement that there is, according to the evidence, no general medical opinion upon what category of diseases are properly to be called diseases of the mind. Both doctors have expressed their views, but they have expressed their views as personal views and not ones for which they can call in aid any general body of medical opinion. Doctors' personal views, of course, are not binding upon me. I have to interpret the rules according to the ordinary principles of interpretation, but I derive help from their interpretations inasmuch as they illustrate the nature of the disease and the matters which from the medical point of view have to be considered in determining whether or not it is a disease of the mind.

The broad submission that was made to me on behalf of the accused was that this is a physical disease and not a mental disease; arteriosclerosis is a physical condition primarily and not a mental condition. But that argument does not go so far as to suggest that for the purpose of the law diseases that affect the mind can be divided into those that are physical in origin and those that are mental in origin. There is such a distinction medically. I think it is recognized by medical men that there are mental diseases which have an organic cause, there are disturbances of the mind which can be traced to some hardening of the arteries, to some degeneration of the brain cells or to some physical condition which accounts for mental derangement. It is also recognized that there are diseases functional in origin where it is not possible to point to any physical cause but simply to say that there has been a derangement of the functioning of the mind, such as melancholia, schizophrenia and many other of those diseases which are usually handled by psychiatrists. This medical distinction is not pressed as part of the argument for the accused in this case, and I think rightly. The distinction between the two categories is quite irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it but simply with the mental condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there.

The distinction that emerges from the evidence of Dr. Gibson, and which has been argued by Mr. Skelhorn, is a different one. It is that this is something which is capable of becoming a mental disease but has not yet become one. It has not yet created any degeneration of the brain and the argument is that it is merely interfering temporarily with the working of the brain by cutting off the supply of blood in the same way as concussion might, or something of that sort. I am invited to say that this disease at this stage is purely physical; when it interferes with the brain cells so that they degenerate, it then becomes a disease of the mind. This would be a very difficult test to apply for the purposes of the law. I should think it would be a matter of great difficulty medically to determine precisely at what point degeneration of the brain sets in, and it would mean that the verdict depended upon a doubtful medical borderline.

The law is not concerned with the brain but with the mind, in the sense that "mind" is ordinarily used, the mental faculties of reason, memory and understanding. If one read for "disease of the mind" "disease of the brain," it would follow that in many cases pleas of insanity would not be established because it could not be proved that the brain had been affected in any way, either by degeneration of the cells or in any other way. In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent. There is no warranty for introducing those considerations into the definition in the McNaghten Rules. Temporary insanity is sufficient to satisfy them. It does not matter whether it is incurable and permanent or not.

1956

REGINA
v.
KEMP.

Devlin J.

I think that the approach of Mr. Lee to the definition in the Rules is the right one. He points out the order of the words "a defect of reason, from disease of the mind." The primary thing that has to be looked for is the defect of reason. "Disease "of the mind" is there for some purpose, obviously, but the prime thing is to determine what is admitted here, namely, whether or not there is a defect of reason. In my judgment, the words "from disease of the mind" are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin, a distinction which in 1843 was probably little considered. They were put in for the purpose of limiting the effect of the words "defect of reason." A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law. But the Rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power. It was not intended that the defence should plead: "Although with a healthy mind he nevertheless had "been brought up in such a way that he had never learned to "exercise his reason, and therefore he is suffering from a defect "of reason." The words ensure that unless the defect is due to a diseased mind and not simply to an untrained one there is insanity within the meaning of the Rule.

Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the Rules. I shall therefore direct the jury that it matters not whether they accept the evidence of Dr. Fenton or Dr. Gibson, but that on the whole of the medical evidence they ought to find that there is a disease of the mind within the meaning of the Rule.

[Counsel then addressed the jury and his Lordship summed up to them, whereupon they returned their verdict without retiring.]

Guilty but insane.

Solicitors: *Director of Public Prosecutions; Farnfield & Nicholls, Warminster.*

ASHDOWN *v.* SAMUEL WILLIAMS & SONS LTD.

C. A.

1956
Oct. 22, 23, 29;
Nov. 26.

Singleton, Jenkins and Parker L.JJ.

Licensor and Licensee — Special terms of licence — Warning notices — Liability of licensor for injuries to licensee—Dock estate—Part let to tenants and part retained in occupation of owners — Access to tenants' premises obtainable only over estate—Right of way giving access — Crossed by railway lines — Short cut — Used by tenants' employees with knowledge of owners — Employee injured through negligence of owners — Liability of owners — Effect of notices disclaiming liability for injury caused by owners' negligence.

Negligence—Safe system of work—Access to place of work—Employer's premises wholly surrounded by private land — No means of access from public highway—Duty of employer to provide safe route to premises.

Industrial premises occupied by the second defendants were situated on part of a large dock estate and leased from the first defendants, owners and controllers of the dock estate. The premises were wholly surrounded by the dock estate, over part of which the second defendants' employees necessarily had to pass to obtain access to their place of work. One route was by a right of way demised to the second defendants by their lease for their use and for the use of their workpeople coming and going from their place of work. It led from the main road over a private road which was crossed at various points by railway lines and on which railway wagons were shunted from time to time. There was also a short cut, passing over property occupied by the first defendants, crossed by a number of railway lines which the second defendants' employees had used for at least 20 years, with the knowledge of their employers, and with the knowledge of the first defendants who had never objected to such user. Notices were posted by the first defendants at various points over the estate. One in particular (notice "A") was posted on the private road, at a point where it was visible to those using the short cut. It was headed "Notice and Warning" and its terms were to the effect that the road was private property and that all persons using it were there at their own risk and should have no claim against the first defendants for any injury or damage caused to them, whether due to the first defendants' negligence or breach of duty. A further notice (notice "B"), posted nearby and visible to those using the right of way, was in similar terms, but specifically gave warning of engines and trucks standing on the railway lines.

The plaintiff, an employee of the second defendants, used the short cut one morning to reach her place of work. While crossing a railway line and before reaching her destination she was knocked down and injured by railway trucks which were being shunted along the line. The plaintiff, in evidence, admitted that she had read the first few lines of notice "A" and could have read the rest of the notice.

It was not disputed that the servants of the first defendants had been carrying out the shunting operations negligently:—

C. A.

1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Held, (1) that the plaintiff came upon the first defendants' land as a licensee under the conditions contained in notice "A," all of which were binding upon her even though she had only read part of them; and that the notice was adequate to absolve the first defendants from liability for their negligence.

Parker v. *South Eastern Railway Co.* (1877) 2 C.P.D. 416 applied.

Henson v. *London and North Eastern Railway Co.*, 62 T.L.R. 369; [1946] 1 All E.R. 653 considered.

(2) That the second defendants had provided the plaintiff with a reasonably safe way of reaching her work in so far as it was necessary for her to traverse the premises of the first defendants; that the dangers involved in crossing railway lines were patent and the second defendants were under no duty to warn her of the particular danger of the shunting in question which they could not have reasonably foreseen.

Decision of Havers J. [1956] 2 Q.B. 580; [1956] 2 All E.R. 384 varied.

APPEAL from Havers J.[1]

The following statement of facts is summarized from the judgment of Havers J. The first defendants, Samuel Williams & Sons Ltd., were wharfingers and lightermen, mechanical engineers and contractors, who owned and controlled a large dock estate situate near the River Thames at Tilbury, south of Dagenham Dock station. Parts of the estate were let off to tenants, but parts were retained by the first defendants in their own occupation. Among their tenants were the second defendants, Wagon Repairs Ltd. Over the dock estate were a number of private roads giving access to the various occupiers. In particular a private road, known as Chequers Lane, led from the main road and ran down the centre of the estate. In addition, a number of railway lines and sidings ran in all directions and intersected the estate at many points. At various times of the day trucks were shunted over the lines into the sidings.

The second defendants had premises on part of the dock estate, which they occupied as tenants under a lease for 42 years made on July 8, 1927. The land demised to them was wholly surrounded by the dock estate except on the eastern boundary where there was a road in which was a gate through which access to their premises could have been obtained had it been kept open, but the gate was kept locked. Their employees had necessarily, therefore, to obtain access to their place of work over some part of the dock estate. A right of way over Chequers Lane was demised to the second defendants by their lease leading from the main road. It was expressed to be for the use of the second defendants and their servants and workmen and others having business with them coming and going to and from the premises, and led from the main road along Chequers Lane, over a level crossing and crossed three other railway lines before reaching the second defendants' main gate. Apart from that route there was a short cut from the main road to a side gate of the premises. That led a short way down Chequers Lane, over the level crossing and crossed a part of the estate retained by the first defendants in their own occupation. It involved crossing a number of railway lines before reaching the side entrance to the second defendants' premises. The short cut had been used by employees of the second defendants for many years, at least since 1939. The first defendants knew that they used it and had never in any way objected or taken any steps to prevent their user.

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[1] [1956] 2 Q.B. 580; [1956] 2 All E.R. 384.

Certain notices had been posted by the first defendants at different points of the dock estate. Two in particular (hereinafter referred to as notices " A " and " B ") were posted close to the point where Chequers Lane was crossed by the railway line. Notice " A " was erected on a board 3 ft. high and 8 ft. 3 ins. from the ground and was clearly visible to those using the short cut. It read as follows: " Notice and Warning. This property " is private property. Every person, whether an invitee or other" wise, whilst on the said property is there entirely at his own " risk and must be deemed to take the said property with every" thing thereon as he finds it with notice of the nature, condition " and state thereof and he shall not have or make any claim for " injury or damage against Messrs. Samuel Williams and Sons, " Ltd., howsoever such injury and/or damage may be occasioned, " or any of their assigns, or their respective lessees or tenants, " or their respective servants agents or workmen whether or not " such injury or damage is in any way whatsoever due to any " negligent act, breach of duty, default and/or omission on the " part of Messrs. Samuel Williams and Sons, Ltd. and/or any " of their assigns or their respective lessees or tenants or their " respective servants agents or workmen. All persons are only " allowed to be on the said property on the distinct understanding " that they do so entirely at their own risk. Samuel Williams " and Sons Ltd. W. J. Crafter, Secretary."

Notice " B," which was close by, and was visible to persons using the long route, was also painted on a board and was headed " Warning," and read as follows: " This road is a private road

C. A.
1956

Ashdown
v.
Samuel
Williams &
Sons Ltd.

"and the railway lines and tracks crossing the said road and land "to the south of Dagenham Dock Station are the property of "Samuel Williams and Sons Ltd. Every person whilst on the "said road, lines, tracks or land is there at his own risk and "must beware of engines, trucks and other vehicles whether on "or off the said lines or tracks and take the said land and road "with everything thereon as he finds them with notice of the "nature, conditions and state thereof, and he shall not have or "make any claim for injury or damage against Samuel Williams "and Sons Ltd. or any of their assigns or their respective lessees "or tenants or their respective servants agents or workmen "whether such injury or damage is in any way due to negligence "or not. Persons are allowed to use the said road and land on "this understanding entirely at their own risk. Samuel Williams "and Sons Ltd. W. J. Crafter, Secretary." There were three other notices, farther along Chequers Lane, warning that there were railway lines a little farther along the lane.

In April, 1948, the plaintiff, Violet Ashdown, a widow, aged 53, was engaged by a representative of the second defendants, Mr. Dear, to work as a canteen assistant and part-time cleaner in their premises. At that interview the short cut to the premises was pointed out to her by Mr. Dear. She also knew of the long route demised by the lease. On the morning of September 8, 1949, she took the short cut and while crossing the railway line she was caught by the buffer of one of three trucks which were being fly-shunted back along the line, knocked down and injured. The servants of the first defendants who were doing the shunting took no precautions to see whether the line was clear and gave no warning by whistle or otherwise. On a claim for damages for negligence against both defendants, the plaintiff alleged that at the interview in April, 1948, at which she was engaged, the second defendants' representative had indicated to her the short cut across the first defendants' property to the main road and had in fact accompanied her along it; that that route, to the knowledge of the second defendants, had been used by their servants for a period of approximately 20 years immediately preceding the accident; that the route crossed a single track railway line, the property of the first defendants upon which railway trucks were habitually left standing for periods of up to one week; and that she was injured by one of three trucks owing to the negligence of the defendants, or one of them, or their respective servants or agents. As against her employers, the second defendants, she alleged (a) that they expressly or impliedly assented to her use of the route, the dangers whereof were, or ought to have been, known to them; and (b) that they failed to provide and enforce the use by their servants of a safe route to their premises. As against the first defendants, the negligence alleged was that they failed to keep a proper lookout; failed to give any or any sufficient warning of the approach of the railway trucks; and failed to provide any or any adequate supervision of the shunting operation.

Havers J. held, (1) that the plaintiff, while using the short cut, was a licensee upon the first defendants' land, but that she was bound by the terms of notice "A" in so far as she had read them, and equally bound by the rest of its terms if she had negligently or intentionally refrained from reading them, and that therefore she was a licensee upon the terms of that notice and the first defendants were entitled to rely upon it as a defence even though they had been guilty of negligence; (2) that, although in the circumstances it was sufficient for the first defendants to rely on the terms of notice "A," the plaintiff was also bound by notice "B" as it was clearly visible and the first defendants had done what was reasonably necessary to give her notice of its terms, and they were entitled to rely upon it. In those circumstances, even though the first defendants had been negligent in carrying out the shunting operation, the plaintiff's case against them failed; (3) that it was the duty of an employer whose premises did not abut upon a highway, but were entirely surrounded by some other person's private property, to provide a means of access by which his employees could reach their place of work, and that in such a case it was the employer's duty to take reasonable care to ensure that the route was reasonably safe for his employees' use. That duty applied to the second defendants in respect of the right of way and they were also under the same duty in respect of the short cut as it was a route which they had authorized their employees to use; (4) that, by pointing out the short cut to the plaintiff as one which she was authorized to use without warning her of its danger, they had failed in their duty towards her, and her injuries were due to their negligence as she probably would not have used the route had she been warned of its danger.

The second defendants appealed against that decision and the plaintiff, by way of cross-notice, appealed against the judgment in favour of the first defendants.

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Marven Everett Q.C. and *G. R. F. Morris* for the second defendants. There is no duty on an employer to take any steps with regard to the employee's way to work unless it lies over the employer's own land. Until the workman actually comes into the course of the day's work or under the employer's orders the employer's duty is no more than an invitor's duty. There is no authority on the duty of an employer while the employee is on his way to work.

The duty which the judge held that the second defendants were under was the duty owed by a master to his servant. To ascertain whether that duty does in fact exist in this case it is necessary to see how the duty of a master arises at common law. It is a duty which arises by reason of a proximity created by the contract of service. In a case of master and servant the employee, if hurt, does not sue in contract but in tort, although the duty is created by the circumstance of the contractual relationship. The employer's duty at common law does not arise until the workman is on the employer's premises, except within certain limits. The employer is not liable in respect of things over which he has no control, and his common law duty to his workman is limited to periods when the workman is under his, the employer's, actual control: see *Cilia* v. *H. M. James & Sons.*[2] The only duty an employer can owe when the workman is not on his premises and not under his actual control is a duty to warn, but on the facts concerning the two ways to the factory of the second defendants there could have been no such duty because of the obvious nature of the danger.

R. F. Levy Q.C. and *Neil McKinnon* for the plaintiff. One is forced back to first principles because there is no case in respect of an employer's duty to his workman on his way to work. The question is whether any duty exists. Here the employer has a factory entirely surrounded by the property of a third party, and it necessarily follows that his workmen will use the only means of getting to work by crossing the land of the third party.

The duty of an employer to take reasonable care for the safety of his workman extends to wherever the employer requires the workman to be. Thus it is the duty of the employer to take reasonable care of his workman while the workman is crossing the land of the third party. As to the nature of the duty, see *per* Denning L.J. in *Christmas* v. *General Cleaning Contractors Ltd.*[3] Here the second defendants could not control trucks on

[2] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[3] [1952] 1 K.B. 141, 149.

the first defendants' land or the land itself, but the danger to their workmen crossing the land must have been obvious, and it follows that the only course open to them to protect their workmen was to warn them, and in particular the plaintiff, of that danger. Had the plaintiff been told that the route was dangerous she would most likely have heeded the warning. It was the duty of the second defendants to warn the plaintiff against the danger of using the short cut.

Marven Everett Q.C. in reply on the appeal. The plaintiff in this case never assumed the legal character of a servant because when injured she was still on her way to work, and so never came under the master's control. There was, therefore, at the time of the accident, no relevant master and servant relationship: see *Paris* v. *Stepney Borough Council*[4] and *Davidson* v. *Handley Page Ltd.*[5] On the facts it was never shown that any breach of duty on the part of the second defendants was a causative factor in the damage suffered by the plaintiff.

R. F. Levy Q.C. and *Neil McKinnon* for the plaintiff on the cross-appeal. The plaintiff was bound only by that part of notice "A" which she read and not by the part she could have read but did not read. An occupier of land is under a duty to take precautions if he knows that there are people using his land —it makes no difference whether as licensees or trespassers. If his acts are negligent he is prima facie liable at common law. If he licenses people to use his land he must take reasonable care for their safety even though he has put up a warning notice. If that be wrong, the occupier can only take advantage of the notice in so far as the licensee knows of its terms. There is no authority in tort, but only in contract, as to how far a warning notice bears on an occupier's acts of negligence: see *Slater* v. *Clay Cross Co. Ltd.*[6]

Notice "A" relates only to the static condition of the land and the equipment thereon, and does not extend to acts of negligence of the defendants' servants, for example, negligent shunting. Actual knowledge of the conditions of the notice must be brought home to a licensee before he is bound by them: see *per* Scott L.J. in *Henson* v. *London and North Eastern Railway Co.*[7] *Parker* v. *South Eastern Railway Co.*[8] is a case in contract and so not applicable to this case. If a licensee reads the conditions but does not understand them there is no knowledge of them. In this case, assuming that the plaintiff understood the part she read, she is bound, but only by that part. However, in so far as that part of the notice by which she was bound curtails the liability of the first defendants, it curtails it only in respect of the static condition of the land and not in respect of negligent acts of the defendants' servants. The part of the notice by which the plaintiff was bound is not, therefore, adequate to absolve the first defendants from their liability for their servants' negligence.

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[4] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[5] (1945) 61 T.L.R. 178; [1945] 1 All E.R. 235.

[6] [1956] 2 Q.B. 264, 268, 272.

[7] [1946] 1 All E.R. 653, 656.

[8] (1877) 2 C.P.D. 416.

Montague Berryman Q.C. and *David Croom-Johnson* for the first defendants. In granting a licence to enter upon his land an occupier can impose conditions whereby he is absolved from all or some liability which he would otherwise be under at common law: *Wilkie* v. *London Passenger Transport Board.*[9] Where a condition exonerating a licensor and his servants from liability for negligence is attached to a licence, it gives exemption from liability for (a) the static condition of the premises, and (b) the negligent acts of the licensor's servants committed while the licensee is upon the premises.

The part of notice " A " which the plaintiff read and understood means: " You come on my land at your own risk, and must " be deemed to take it with everything there as it is and to have " no cause of action for any injury however caused." In *Robert Addie & Sons Collieries* v. *Dumbreck*[10] the machine installed was in the nature of an operation carried on on the land, as was the shunting in the present case. Shunting is not an alteration in the nature of the land. If the plaintiff was a licensee she was so on the conditions the occupiers imposed, and if she were injured by shunting, that was not their responsibility because those conditions excluded liability for negligence in the ordinary use of the land. The words " own risk " have always been applied to cover any form of negligence limited to ordinary user of the land: see *McCawley* v. *Furness Railway Co.*,[11] *Rutter* v. *Palmer*[12] and *Luddit* v. *Ginger Coote Airways Ltd.*[13] On those three authorities the first defendants, by warning the plaintiff that she entered their land at her own risk, were absolved from liability for negligence however arising.

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[9] (1947) 63 T.L.R. 115; [1947] 1 All E.R. 258.

[10] [1929] A.C. 358.

[11] (1872) L.R. 8 Q.B. 57.

[12] [1922] 2 K.B. 87.

[13] [1947] A.C. 233; 63 T.L.R. 157; [1947] 1 All E.R. 328.

The plaintiff was bound by the restricting terms of the notice, even though she did not or could not read them, if reasonable steps were taken to bring them to her notice: *Parker* v. *South Eastern Railway Co.*[14]; *Hood* v. *Anchor Line.*[15]

R. F. Levy Q.C. in reply. All the cases cited for the first defendants in support of the proposition that the plaintiff was bound by the conditions of a notice she had not read were cases of contract. The question here is whether the law as to notices of this kind is the same in tort as it is in contract. One is bound by the conditions in a contract because one knows that they are there; but can it be right to say that a licensee is bound by conditions attached to the licence when he has not seen them? The right principle is that he is bound only by such of the conditions as he has read and understood.

Cur. adv. vult.

November 26. The following judgments were read.

SINGLETON L.J. stated the facts and continued: The duty of employers to their workpeople is to take reasonable care so as to see that the workpeople are not subjected to unnecessary risk. I cannot see that any breach of that duty was proved. The plaintiff knew from the first time she went to the premises that there were rails to be crossed. She knew that shunting operations were carried on there. She must have seen them taking place many a time during the five or six months she was working in the canteen. She was a woman around 50 years of age. A warning to her that it was more dangerous to go by the short-cut than by the longer route—if it was so—would not have been of any help to her. At the time of her accident she had only the one last set of rails to cross and she would have had to cross the same set if she had taken the longer route. Moreover, she had seen, and read part of, the notice at the entrance to the coal yard [notice "A"], to which I shall refer later. In my judgment, there was no basis on which the employers could be found liable for negligence, and their appeal should be allowed.

The claim against the first defendants gives rise to much greater difficulty. The accident arose through negligence on the part of their employees, as the judge found, and that finding is not challenged. The judge held, however, that the defendants were absolved from liability by reason of the notice "A" which was posted at the entrance to the coal yard. It is possible on

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[14] 2 C.P.D. 416.

[15] [1918] A.C. 837.

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Singleton L.J.

first reading the notice to form the impression that it relates only to that which has been described as the static condition of the property. If one examines it it becomes clear that it refers to something more than that. [His Lordship read the provisions of notice "A" and continued:] The judge based his decision largely upon *Parker* v. *South Eastern Railway Co.*[1] That was a case in which there was a contract between the plaintiff and the railway company. It was submitted by Mr. Levy, on behalf of the plaintiff, that there was a difference between that case and the present case in that in the case before us there was no contract. In *Wilkie* v. *London Passenger Transport Board*,[2] the court held that the pass which the plaintiff held was a mere licence and not a contract, and that the condition on the pass operated in exonerating the defendants from liability. The only effective notice for the purposes of this appeal is notice "A," which I have read. The plaintiff saw this notice; she read the first few lines of it; she knew that she went on the first defendants' premises at her own risk; she knew that the first defendants carried on shunting operations from time to time. We are, I think, bound to hold that she entered upon the premises by licence from the first defendants, and on the conditions contained in the notice.✓

In *Henson* v. *London and North Eastern Railway Co.*[3] the plaintiff succeeded, on the ground that the railway company failed to show that the delivery of the pass to the plaintiff took place in such circumstances as to amount to reasonable notice that the writing on the pass contained conditions. Scott L.J. said[4]: "The pass is certainly not a written contract. With "extrinsic oral evidence it might possibly have been regarded as "containing a part of the term of an oral contract; but the "plea alleged no oral contract and there was no evidence to "that effect. Still less was there either plea or evidence that "Coote & Warrens received it from the defendant company in "the capacity of agent for the plaintiff to make such a contract, "or, if they did, that they had his authority so to do or that "they purported so to act, so as to permit of ratification by the "plaintiff. To me the very notion of imputing all these legal "notions to the non-legal mind of an ordinary working-man "trained in wagon repairing but not law is repugnant. But even "if the document were treated as comparable to a cloak-room

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[1] (1877) 2 C.P.D. 416.

[2] 63 T.L.R. 115; [1947] 1 All E.R. 258.

[3] 62 T.L.R. 369; [1946] 1 All E.R. 653.

[4] [1946] 1 All E.R. 653, 656, 657.

" ticket, which it is not, as in those cases there is always " indubitably some contract, the question of fact preliminary to " the attempt of the defendant to rely on special conditions of " immunity must always be 'Did the defendant company take " 'all reasonable steps to make the plaintiff realize that there " 'were such conditions attaching to the defendants' offer'? " To the question in this case whether the plaintiff, a workman " employed by Coote & Warrens and not by the railway com- " pany, was contracting himself, and his widow and children if " he was killed, out of all rights of action against the railway " company, I am satisfied that a jury would certainly answer " 'No!' If so, even if a contract could be spelt out of the " pass, barring the plaintiff's claim, that defence would fail. " Theoretically it might be within paragraph 5 of the defence " to argue alternatively that the plaintiff was an invitee, who " had accepted an invitation to enter and be upon the defendant " company's premises on an express condition, brought home to " his mind that if he was hurt by the invitor's negligence he " would have no right of action. But to this plea, the answer " would be the same, namely, that the defendant company had " not taken all the steps reasonably necessary to bring that " astonishing surrender of his elementary rights home to his " mind."

Tucker L.J. said[5]: " In my opinion, therefore, the railway " company having failed to prove actual knowledge of the " existence of conditions on the pass have not established " the existence of circumstances which compels the court to infer " such knowledge, in other words that in the circumstances of " this case they have not proved that they gave reasonable " notice to the plaintiff of the existence of the condition on which " they rely. The trial judge did not decide this point as in " his view the defendant company were not entitled for other " reasons to rely on the walking pass."

It appears to have been assumed in that case that if the conditions had been brought sufficiently to the notice of the plaintiff he would not have succeeded in his claim. In the present case the conditions were brought sufficiently to the notice of the plaintiff. She read part of the notice: she might have read all of it. She knew she went on to the land at her own risk. The difficulty which arises here is in the interpretation of the notice. It is primarily directed to the " nature condition and " state " of the property to which the licence is related, but the word "property" is followed by the words "with everything "thereon as he finds it." There were railway lines and trucks upon the property, and shunting took place, as the plaintiff knew. She took the risk of an engine or a truck being in her way. And by later words in the notice she could not have a claim against the occupiers for injury or damage howsoever occasioned whether it was in any way whatsoever due to any negligent act, default or omission on the part of the defendants or their servants. These are wide words. I am unable to read them as applicable only to the static condition of the property: the presence of the lines of railway is sufficient to indicate that there will at times be movement of engines and trucks upon them, and the plaintiff knew that from the first time she went upon the property. In these circumstances, I cannot see that it is right to read the words "howsoever such injury and damage may be "occasioned" as limited to the condition of the ground. I should feel more difficulty if we had to consider a claim arising from negligence in the driving by the defendants' servants of a motor-car and damage arising therefrom. The danger arising from shunting operations was one which must have been present to the mind of everyone who went upon the property, and the words of the notice were intended to relieve the defendants from liability for negligence during that operation. We ought so to read them and to hold that her claim against the occupiers is barred.

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[5] [1946] 1 All E.R. 653, 661.

I do not regard notice "B," which was posted further down Chequers Lane, as relevant. The plaintiff said she did not see it. I do not think it can be said that it had been brought sufficiently clearly to her notice, and she is not bound by it. This does not matter if her claim is defeated by notice "A." It appears to me that notice "A" contains adequate words to convey to the plaintiff the conditions on which her licence to cross the first defendants' premises was granted. In my judgment her appeal should be dismissed.

JENKINS L.J. I agree. Inasmuch as the "short cut" over the first defendants' land had been used by employees of the second defendants with the knowledge and acquiescence of the first defendants for a matter of 20 years, I think the judge was clearly right in holding that the plaintiff, when she met with her accident, was on the first defendants' land as their licensee and not as a trespasser; and the contrary was not argued before us by Mr. Berryman on the first defendants' behalf.

It follows that if the plaintiff's licence had been free from special conditions so that the respective rights and duties of the plaintiff as licensee and the first defendants as occupiers fell to be determined simply by the general law, the plaintiff's claim in damages against the first defendants for the injuries which she sustained through the negligence of the first defendants' servants in carrying out their shunting operations would have been unanswerable; for, apart from his liability in relation to traps or concealed dangers of which he knows but against which he omits to give warning to his licensee, "The occupier is also "liable if he or his servants do any positive act of negligent mis- "feasance by which the licensee suffers harm, as by negligently "driving over a person whom he has permitted to use a private "way. The licence is granted subject to existing dangers, but no "further act must be done by the grantor or his servants to "endanger the safety of the person to whom it was given": see Salmond on Torts, 11th ed. (1953), p. 573, citing *Gallagher* v. *Humphrey*.[6]

But it is contended on the part of the first defendants that the licence granted to the plaintiff was subject to special conditions imposed by them as occupiers, by which the plaintiff was bound if she chose to use the "short cut," and which, on their true construction, precluded her from making any claim against the first defendants in respect of the negligent shunting operations of their servants.

It is not in dispute that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his, including liability for his own or his servants' negligence, by conditions aptly framed and adequately made known to the licensee. But it is contended on the plaintiff's behalf that the conditions on which the first defendants rely were not framed in terms apt to absolve them from liability for a negligent operation by their servants such as the negligent shunting operation in the present case; and that even if such conditions were framed in terms apt so to absolve the first defendants, they, or at all events the parts of them directed to the negligence of the first defendants' servants, were not sufficiently made known to the plaintiff.

The conditions relied on by the first defendants are those set out on the notice boards "A" and "B." The judge, applying the principle of *Parker* v. *South Eastern Railway Co.*,[7] held the

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[6] (1862) 5 L.T. 684.

[7] 2 C.P.D. 416.

C. A
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Jenkins L.J.

plaintiff bound by both notices, although in his view it was enough for the first defendants' purpose that she should be held bound by notice " A." As to notice " B " the judge said this [8]: " With regard to notice ' B,' as I have already said, I am not " satisfied that she did actually see that notice. On the other " hand, applying the principle of *Parker* v. *South Eastern Railway Co.*,[9] as I am satisfied the notice was there and was plainly " visible to anybody who kept his eyes open, I think the first " defendants did what was reasonably sufficient to give the plaintiff notice of the terms contained in that notice. For that " reason I hold that she was also bound by the terms contained " in notice ' B.' "

With all respect to the judge, I cannot agree with his conclusion regarding notice " B." If the plaintiff did not actually see that notice, I do not think there is any sufficient reason for holding her constructively bound by the conditions set out thereon as conditions applicable to her licence to use the " short " cut." Even if she saw notice " B " simply as a notice board, and did not read the conditions set out thereon, I do not think it should be presumed against her that she knew or ought to have known that they were conditions relating to the " short " cut." The conditions obviously applicable to the " short cut " were those on notice " A." Notice " B " was less appropriately sited for the purpose of displaying conditions intended to be applicable to the " short cut," and to my mind knowledge that any conditions set out on that notice were intended to apply to the " short cut " cannot fairly be imputed to the plaintiff.

There remains notice " A," the conditions set out on which were in these terms: [His Lordship read the notice and continued:] This notice is somewhat verbose, but I think it would be clear to any reasonable person reading the whole of it that it was intended to convey to any person who might choose to go upon the land to which it related that such person whilst on such land would be there entirely at his own risk, and was not to have any claim against the first defendants for injury or damage howsoever occasioned, and whether or not due to any negligent act or omission on the part of the first defendants or their servants. If this degree of knowledge of the terms of notice " A " is to be imputed to the plaintiff, I think her case against the first defendants must fail.

Mr. Levy, for the plaintiff, argued that this was not so, because on the true construction of the terms of notice " A,"

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[8] [1956] 2 Q.B. 591.

[9] 2 C.P.D. 416.

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Jenkins L.J.

read from beginning to end, they only exonerated the first defendants from liability with respect to negligent acts or omissions affecting the static condition of the property itself as distinct from activities such as shunting negligently carried on upon the land. For my part, I think the language used is plainly wide enough to include negligent shunting on the part of the first✓ defendants' servants, and I therefore reject this branch of Mr. Levy's argument. But Mr. Levy went on to submit that whatever the true construction of the whole of the notice may have been, the plaintiff was only bound by what she actually read, and that what she actually read was confined to the static condition of the property itself.

The plaintiff's evidence as to what she actually read is as follows. In her examination-in-chief she was asked: "(Q) Coming in at the main entrance did you at any time notice a board that was standing near there with some writing on it? (A) Yes. (Q) Was that a board headed: 'Notice and Warning' or 'Warning and Notice'? (A) Yes. (Q) Was this board on a stand or structure? (A) Yes. (Q) Did you notice about what height it was? (A) No, I never took that much notice. It was too high. (Q) I know you did not measure it, but in relation to yourself was it on a level with you or above you, or what? (A) It was above me. (Q) And what was its condition? Was it clean or easily readable? (A) No, it was not. (Q) Did you ever read it in fact? (A) I read a part of it, but I took not much notice of it because you could not discern the writing on it much; it was in such a dirty condition. (Q) Do you know about how much of it you may have read when you say you read a part of it? There may be twenty or twenty-five lines of it. Did you read one or two or six or a dozen or what? (A) Not many—three or four. I was not able to read many." Havers J. said: "Three or four lines at most, I gather?" "(A) Yes." Counsel continued: "You think that you read three or four lines, and you could not read any more because it was so dirty. But did you understand the three or four lines which you did read?" "(A) No."

Then in cross-examination she was asked: "(Q) Let me ask you about the first notice which you did see. You read the first three or four lines of it? (A) Yes. (Q) Did you manage to read this, first of all that it said: 'Notice and Warning'? (A) Yes. (Q) Did you think that that might be directed to you? (*No answer.*) (Q) Did you think that that notice and "warning might have been directed to you? (A) No. (Q) Why "not? (A) It would be directed to anyone. (Q) Yes, but you "were going right past it and into the coal yard which it faced, "were you not? (A) Yes. (Q) Let us see how far you read. "Did you manage to read this in the first three or four lines: "'This property is private property'? (A) Yes. (Q) It was "plain to you that that referred to the property behind the "notice, was it not? (A) Yes. (Q) Did you read this: 'Every "'person, whether an invitee or otherwise, whilst on the said "'property is there entirely at his own risk'?" and she said "No" to that. Then she was asked: "(Q) That was in the "first three or four lines, was it not? (A) I never studied it "all that amount. (Q) I am not talking about studying it. "You certainly agree that you noticed it, did you not—you saw "it? (A) Yes. (Q) And you agree that you attempted to read "it? (A) Yes. (Q) And you agree that you succeeded in reading the first three or four lines, do you not? (A) Yes. . . . "(Q) Cannot you answer that question?" and the answer was: "It said I would be there at my own risk, and that is as far as I "looked at it. I just skipped the words. I did not take them "all in properly. (Q) You could have read the rest of it if you "had wanted to, could you not? (A) Yes, I suppose I could." Later she agreed that the property had on it a multiplicity of railway tracks of one sort or another, which were described by counsel as "running all over the place, are they not?" and the witness said "Yes."

Basing himself on this evidence, Mr. Levy took as the "three or four lines" actually read by the plaintiff as the part of the notice ending with "as he finds it" or, alternatively, "state thereof," and contended that if the notice had in fact ended at that point it would on its true construction have been confined to the static condition of the property. I cannot agree. It seems to me that even if the notice is treated as in fact ending with "state thereof," it lays down two distinct conditions concerning any person coming upon the land, namely, (a) that whilst on the property he is there entirely at his own risk, and (b) that he must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof. I see no sufficient reason for limiting the first of these two conditions to matters covered by the second. If so limited it would, as it seems to me, be superfluous, and if not so limited I think it extends to negligence, and indeed cannot be referable to anything else. (See *McCawley* v. *Furness Railway Co.*[10]; *Rutter* v. *Palmer.*[11]) It should be noted that as appears from the plaintiff's answer in cross-examination she did at all events appreciate that the notice said she would be there at her own risk. Accordingly, even if notice "A" should for the present purpose be treated as ending with the words "and state thereof," and as actually known to the plaintiff to that extent, and that extent only, I think it suffices to defeat the plaintiff's claim against the first defendants.

I should, however, briefly state my view as to the extent of the knowledge of the terms of this notice which ought in the circumstances to be imputed to the plaintiff. On her own evidence she saw notice "A," read the heading "Notice and "Warning," and some three or four lines in addition, appreciated that it said she would be there at her own risk, but did not trouble to read further. I think it is clear beyond argument that these facts suffice to bring the case well within the principle of *Parker* v. *South Eastern Railway Co.*[12] on which the judge relied, and according to that principle to justify the imputation to the plaintiff of knowledge of the whole contents of the notice.

But it is pointed out that *Parker* v. *South Eastern Railway Co.*[12] was a case in contract, whereas the present case is a case in tort to which, so it is said, different considerations apply. Speaking for myself, I see no reason in principle for holding that something more is needed to give a mere non-contractual licensee constructive knowledge of a condition restricting or excluding his ordinary right to be treated with reasonable care while on the land to which the licence relates, than is required to give a party to a contract constructive knowledge of a term restricting or excluding some right of action he would or might otherwise have under the general law. Mr. Levy relied on *Henson* v. *London & North Eastern Railway Co.*[13] as showing that actual knowledge of every word of the excluding or restricting condition must be brought home to the non-contractual licensee before he can be held bound by it. I do not think Scott and Tucker L.JJ. intended to go as far as that in *Henson's* case.[13] Here the plaintiff saw and partly read the notice, knew from what she read that the notice was a warning, and knew that it said she would be on the land at her own risk, but chose not to read the rest of it, although she could have read it had she chosen to do so. In these circumstances, I think she should be treated as if she had read it all.

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[10] (1872) L.R. 8 Q.B. 57.

[11] [1922] 2 K.B. 87; 38 T.L.R. 555.

[12] 2 C.P.D. 416.

[13] [1946] 1 All E.R. 653.

As to the claim against the second defendants for breach of their common law duty to the plaintiff as their employee, I do not think the judge's decision in favour of the plaintiff can be supported. I do not accept the view put forward by Mr. Marven Everett, for the second defendants, to the effect that an employer can never in any circumstances be liable as such for the safety of his employee while on his way to the premises where he is employed. Each case must, in my view, depend on its own facts.

On the facts of this case, however, I do not think the plaintiff makes out her case of negligence at common law against the second defendants as her employers. It is not suggested that the right of way granted by the lease of July 8, 1927, from the first to the second defendants was not reasonably safe. Accordingly the second defendants must be taken as having provided the plaintiff with a reasonably safe way of going to work so far as it was necessary for her to traverse the first defendants' premises. But it is said that the "short cut" was not reasonably safe, and that the second defendants by their foreman Mr. Dear were in breach of their duty of reasonable care to the plaintiff in that Mr. Dear showed her the "short cut" and told her everyone used it and she could do so too. I find it unnecessary to consider what the position might have been on the footing that the second defendants knew or ought to have known that the "short cut" was not reasonably safe. In fact it had been used for a matter of 20 years by the second defendants' employees generally, and for a matter of five months by the plaintiff herself before the accident; and so far as is known this was the first accident that had ever happened to anyone using the "short cut." Accordingly, I find it impossible to hold that the "short cut" was not a reasonably safe way. In any case the second defendants could not well forbid the plaintiff to use it, or indeed do anything more than warn her of the danger such as it was, and a warning had already been provided by the first defendants in the shape of notice "A."

For these reasons, I regretfully conclude that the second defendants' appeal from the judgment against them awarded to the plaintiff must succeed, while the plaintiff's appeal from the dismissal of her action as against the first defendants must fail.

C. A.
1956

Ashdown
v.
Samuel
Williams &
Sons Ltd.

Parker L.J. I have come to the same conclusion, and I will deal first with the plaintiff's appeal against that part of the judgment which was in favour of the first defendants. The judge held that these defendants by their servants were negligent in and about the shunting operation which caused the plaintiff's injuries, and that finding was not contested in this court. He held, however, that the plaintiff came upon the land under the conditions contained in a notice, notice "A," and that those conditions absolved the first defendants from liability for such negligence.

It is, I think, clear that in granting a licence to enter upon land the occupier can impose conditions whereby he is absolved from all or some liability which he would otherwise be under at common law. If authority were needed it is to be found in *Wilkie* v. *London Passenger Transport Board*,[14] a decision of this court and binding upon us. That was a case of a licence to travel on the defendants' vehicles, but it decided that conditions could be attached to such a licence cutting down the common law rights which the licensee would otherwise have. Two questions accordingly arise: (1) Was the plaintiff in the present case bound by the conditions set out in notice "A"? (2) Are these conditions adequate to protect these defendants from liability for the negligence found by the judge? If the answer to both questions is "Yes," then the plaintiff in entering upon the land must be taken to have agreed that she had no claim in respect of such negligence.

As regards the first question, the judge found that the plaintiff read the first few lines of the notice. That notice was then in a different form, and it is probable that she read down to the end of the words "with notice of the nature, condition and state "thereof." The plaintiff gave evidence that the rest was illegible, but the judge held that she was wrong and that the rest of the wording was clearly legible. He also found that the plaintiff knew that the notice contained conditions which affected her. Those findings are not contested, and I think it is clear that if the plaintiff was entering upon the land under a contract she would be fixed with the knowledge of all the contents of the notice. (See *Parker* v. *South Eastern Railway Co.*[15]) The defendants had taken all reasonable steps to bring the conditions to her notice. It is, however, said that the plaintiff did not enter under a contract but merely as a licensee, and that in those circumstances she is only bound by what she in fact read.

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[14] [1947] 1 All E.R. 258.

[15] 2 C.P.D. 416.

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Parker L.J.

In *Wilkie* v. *London Passenger Transport Board*[16] it was held that the plaintiff boarded the defendants' bus not under a contract but under a licence subject to conditions, but the further question whether the licensee was bound by conditions he had not read did not arise. For my part I can see no difference in principle between the case of a contract and a licence subject to conditions. In both cases the person claiming exemption must show that he did all that was reasonable in the circumstances to bring the conditions to the other party's notice. Once that is proved it cannot, in my judgment, make any difference that the other party acted unreasonably or deliberately in not reading the conditions.

It is said, however, that the judgments in *Henson* v. *London & North Eastern Railway Co.*[17] suggest that a licensee is only bound by conditions of which he has actual knowledge. I do not, however, read them in that way. Tucker L.J. actually applied the principle of constructive notice. Thus, he says[18]: "However this may be, the defendant company clearly failed "to establish actual knowledge of the conditions on the ticket "and are forced to rely upon what really amounts to constructive "notice, namely, that they took all reasonable steps to give him "notice that the pass contained conditions." He then cites *Parker* v. *South Eastern Railway Co.*[19] and goes on[20]: "The "circumstances in which 'people in general would in fact, and "'naturally, draw that inference' must greatly vary in different "cases. The inference to be drawn in the case of a person taking "a railway or cloakroom ticket and who is thereby entering into "a contractual relationship may be very different from that to "be drawn in the case of a workman who is sent by his "employers in the course of his ordinary employment to do "work on the premises of a third party and to whom a pass is "issued to enable him to proceed to the place where he has to "work. I can see no reason which compels me to infer that in "such a case the workman must understand that the writing on "the pass contains words which will put him in a contractual "relationship with the person on whose premises he is going to "work which may deprive him of his common law rights. It "does not seem to me that it would be right to say that business "cannot be carried on unless such an inference must be drawn. "In my opinion, therefore, the railway company having failed

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[16] [1947] 1 All E.R. 258.

[17] [1946] 1 All E.R. 653.

[18] Ibid. 660.

[19] 2 C.P.D. 416.

[20] [1946] 1 All E.R. 653, 661.

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Parker L.J.

"to prove actual knowledge of the existence of conditions on the pass have not established the existence of circumstances which compels the court to infer such knowledge, in other words that in the circumstances of this case they have not proved that they gave reasonable notice to the plaintiff of the existence of the condition on which they rely."

It is true that Scott L.J. emphasized that the plaintiff in that case was not in any contractual relationship with the defendants, but he does not indicate what, if any, difference that made. He merely goes on to hold that even if there were a contract the defendants had not taken all reasonable steps to bring the condition to the plaintiff's notice. Accordingly, in my judgment, the plaintiff in the present case is bound by the contents of the whole notice, and, accordingly, it becomes unnecessary to consider what the position would be if she were only bound by what she had actually read.

The second and more difficult question is whether the words of the notice are adequate to protect the defendants. Mr. Levy, for the plaintiff, submits that they are not. He invites the court to read the notice as dealing solely with what may be called the static condition of the land. On this view the negligence referred to is negligence in failing to make the land reasonably safe or in failing to warn. The wording, he said, is not adequate to cover supervening negligence of the kind which caused the plaintiff's injuries. At any rate, he says, the wording is ambiguous. I do not think, however, that it is possible on a literal interpretation to read the notice as confined in this way. The reference to taking the "property with everything thereon as he finds it" and the phrase "whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission" make the condition, read literally, wide enough to cover the negligence in question. It is, however, necessary to look beyond the literal interpretation.

In *Rutter* v. *Palmer*[21] Scrutton L.J. said[22]: "In construing an exemption clause certain general rules may be applied: First, the defendant is not exempted from liability for the negligence of his servants unless adequate words are used." It is true that he was there considering a general exemption clause which contained no reference to negligence, but, in my judgment, the principle there laid down applies equally in a case where, though negligence is specifically referred to, it may take several forms. Each case must, of course, depend upon its own

[21] [1922] 2 K.B. 87.

[22] Ibid. 92.

facts, and in particular on what the licensee knows as to the user of the land. Where, for instance, an occupier of land used as a shooting school desires to exclude liability for negligent shooting, he may well have to bring to the knowledge of the proposed licensee that the land is so used. A mere reference to negligence without a warning as to the user of the land might well be insufficient. In the present case, however, the plaintiff knew that the land was intersected by railway lines even before she saw the notice—she had walked out that way on her first visit. Moreover, by the time of the accident she knew full well that shunting operations took place, and, indeed, that these were conducted by the first defendants. Accordingly, she knew the user of the land just as well as if the notice itself had said "Beware of shunting operations," followed by an exemption of negligence.

In these circumstances I have reluctantly come to the conclusion that the first defendants have succeeded in excluding liability for the negligent shunting. I say "reluctantly" in that for my part I doubt whether the notice was designed or intended to apply to anything but the coal yard itself. It is placed at the entrance of that yard, and is to be compared with notice "B," which is dealing with Chequers Lane and all the land south of the station. When, however, this point was referred to in the course of the argument, Mr. Levy expressly disclaimed any intention to rely on it. He had not taken it in the court below, and he refused to take it in this court. In these circumstances I do not pursue it.

Finally, as regards notice "B," in my judgment it cannot be said that these defendants took all reasonable steps to bring the conditions in that notice to the plaintiff's attention. It was not placed at the entrance to the "short route," and, accordingly, was not seen by the plaintiff. Moreover, she had seen notice "A," and thought it applied to her. Even if she had seen notice "B" there was no reason to think that it applied in addition to or in substitution of notice "A." Accordingly, in my judgment, the plaintiff is not bound by the conditions in notice "B."

As to the second defendants' appeal against that part of the judgment which found them liable to the plaintiff at common law, I think that it must succeed. Mr. Everett contended that an employer could never be under any duty arising out of such relationship until the employee arrived at the employer's premises. For myself, I doubt whether the proposition in that

C. A.
1956

ASHDOWN
v.
SAMUEL
WILLIAMS &
SONS LTD.

Parker L.J.

wide form can be supported. So far as the present case is concerned, however, the second defendants did provide a way which was reasonably safe, namely, the long route over the cinder track. But what is said on behalf of the plaintiff is that there was a duty on the defendants, who may be said to have encouraged the plaintiff to use the short route, to warn the plaintiff of the dangers involved in crossing the railway lines. Inasmuch, however, as the dangers were patent and well known to the plaintiff, I cannot think that there was any such duty. I think that this is really conceded, and the contention accordingly is that the second defendants should have warned the plaintiff of the particular danger in question, namely, that a shunting operation might be conducted in such a way as not to be seen or heard—in itself an unlikely event. Bearing in mind that the short route had been used by their employees for some 20 years, and that there had been no accident, I cannot think that the second defendants should have foreseen this danger. Finally, I am not satisfied that, even if there was a duty to warn, the breach of such duty contributed in any way to the plaintiff's injuries.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Blount, Petre & Co.; Douglas Wiseman & Co., Barking; Gardiner & Co.*

P. P.

A. R. WRIGHT & SON LTD. *v.* ROMFORD BOROUGH COUNCIL.

1956
Nov. 7, 9.

Lord Goddard C.J.

[1955 A. No. 1862.]

Contract—Seal—Corporation—Demolition contract with corporation not under seal—Whether enforceable—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 74 (2)—*Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 266.
Local Government.

By an agreement in writing, but not under seal, signed by the defendant council's engineer and surveyor, the plaintiffs were engaged to demolish certain buildings for the council. The value of the contract to the plaintiffs was about £750. The council repudiated the contract, and the plaintiffs claimed damages for breach of contract. The council pleaded that as they were a body corporate and the agreement was not under seal, it was not binding on them. The plaintiffs relied on section 266 of the Local Government Act, 1933,[1] and section 74 (2) of the Law of Property Act, 1925[2]:—

Held, (1) that the common law rule that, subject to certain exceptions, a contract entered into by a corporation was required to be under seal in order to be binding was unaffected by section 266 of the Local Government Act, 1933, and that compliance with the corporation's standing orders was not sufficient to make a contract binding on them where the common law required a seal.

(2) That section 74 (2) of the Law of Property Act, 1925, which authorized the appointment of someone to sign on behalf of the corporation an agreement not under seal, only referred to the execution of an agreement which would be binding on the corporation in spite of the absence of a seal; accordingly, the plaintiffs' claim could not be maintained.

PRELIMINARY points of law.

The plaintiffs, A. R. Wright & Son Ltd., claimed damages for breach, by repudiation, of contract against the Romford Borough Council, and in their statement of claim alleged that by an agreement in writing contained in an offer and tender addressed by them to the defendants and a written order of the defendants' borough engineer and surveyor, the defendants engaged them to demolish certain buildings their property. For this service the plaintiffs were to receive £39 14s. in money and the material obtained in the course of the demolition was to become the property of the plaintiffs. From the particulars in the statement of claim it appeared that those materials formed by far the larger part of the plaintiffs' remuneration as they were estimated to be worth over £3,200, and after allowing for the cost of demolition the plaintiffs' estimated profit on the business was in the neighbourhood of £750. By their defence the defendants alleged that they were a body corporate, incorporated by Royal Charter dated August 27, 1937, and pleaded that the agreement referred to was not under their seal and so was not binding on them. By their reply the plaintiffs relied on section 74 (2) of the Law of Property Act, 1925, and on section 266 of the Local Government Act, 1933, and alleged that the defendants appointed their borough engineer to execute the agreement on their behalf and that it was made in accordance with their standing orders. By an order made in the action by consent it was ordered that the points of law raised in the defence and the reply should be set down and disposed of forthwith and before the trial of the issues of fact.

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[1] Local Government Act, 1933, s. 266: "(1) A local authority may "enter into contracts necessary for "the discharge of any of their "functions. (2) All contracts made "by a local authority or by a com"mittee thereof shall be made in "accordance with the standing orders "of the local authority, and in the "case of contracts for the supply of "goods or materials or for the execu"tion of works, the standing orders "shall—(*a*) require that, except as "otherwise provided by or under the "standing orders, notice of the inten"tion of the authority or committee, "as the case may be, to enter into "the contract shall be published and "tenders invited; and (*b*) regulate "the manner in which such notice "shall be published and tenders "invited: Provided that a person "entering into a contract with a "local authority shall not be bound "to inquire whether the standing "orders of the authority which apply "to the contract have been complied "with, and all contracts entered into "by a local authority, if otherwise "valid, shall have full force and "effect notwithstanding that the "standing orders applicable thereto "have not been complied with."

[2] Law of Property Act, 1925, s. 74 (2): "The board of directors, "council or other governing body of a "corporation aggregate may, by reso"lution or otherwise, appoint an agent "either generally or in any particu"lar case, to execute on behalf of "the corporation any agreement or "other instrument not under seal in "relation to any matter within the "powers of the corporation."

By clause 3 of the charter incorporating the council, the provisions of the Local Government Act, 1933, were expressly stated to apply to the borough thereby created. Order 26 of the standing orders provided for the sealing of documents and how the authority for sealing was to be given. Provision was made in the orders for the signature of documents which were needed for any legal proceedings, and other orders relating to contracts provided, among other things, for the obtaining of tenders and estimates and, by Order 54, that every contract which exceeded £300 in value or amount should be in writing. Orders 55 and 58 contained provisions as to what written contracts should specify and the clauses that were to be inserted as to penalties if the contract exceeded £500 and other matters which it is unnecessary to set out in detail. It was not disputed that the contract alleged in the statement of claim was one the value or amount of which was over both £300 and £500.

C. T. Salkeld-Green for the plaintiffs. The preliminary point of law is whether or not this contract had to be under seal. At common law all contracts made by a corporation aggregate, with certain exceptions, none of which is relevant here, had to be under seal. The first inroad into the common law immunity that a corporation was not bound unless their contracts were under seal was made by sections 173 and 174 of the Public Health Act, 1875, which had the effect that an urban authority had only to seal contracts exceeding £50 in value or amount. Those sections were replaced by section 266 of the Local Government Act, 1933, which expressly provides that the mode of entering into contracts is to be governed by the standing orders. Rule 26 sets out the procedure for sealing any document, but nowhere in the standing orders is there a rule stating which documents should be sealed. Reliance is placed on rule 54, which states: "Every contract which "exceeds £300 in value or amount shall be in writing."

The law relating to the sealing of documents was altered by section 74 (2) of the Law of Property Act, 1925, which provides that a corporation can appoint an agent to enter into contracts on their behalf, from which it follows that Parliament recognized that there were cases in which corporations could enter into contracts which were not under seal.

If the contract in question is to be considered as a contract for £39, then it follows from rule 54 that it need not be in writing. If the contract is to be considered at its commercial value, then by reason of rule 54 it must be in writing. As the contract is in fact in writing, there has been a complete compliance with the standing orders and therefore the contract is enforceable although not under seal. The proviso to section 266 is no more than a protection for those entering into contracts with the council, and they are not under a duty to see that the council has fully complied with their standing orders. There is no standing order which provides which contracts should be sealed, and there is no authority which deals with the matter. It is submitted that this was a contract which at the most required to be in writing. It did not require to be made under seal and is therefore enforceable.

G. D. Squibb Q.C. and *W. J. Glover* for the defendants. The provisions of section 266 of the Local Government Act, 1933, apply to the corporation regardless of the provisions in the charter. One approaches section 266 with the knowledge which Parliament must have had when passing that legislation, namely, that corporations do have to make some contracts without a seal. The section should be read in the light of paragraph 4 of Part V of the Third Schedule to the Act, which gives the power to make standing orders, the purpose of which is the regulation of the business and proceedings of a local authority. They are by their very nature domestic, and in that connexion particular stress is laid on the final words of section 266. There is nothing in the standing orders themselves to affect the position. If the plaintiffs are right, then a seal would become merely a museum piece, and the standing orders, which provide how the seal is to be kept and used, useless. If the standing orders apply at all, this is a contract which falls within rule 54. That being so, the plaintiffs cannot sustain their pleading that the standing orders have been complied with, because rule 55 requires certain matters to be inserted in a contract of the type in question, including a penalty clause, which manifestly was not done. The standing orders are not material to the point to be decided and, if they are material, they have not been complied with, and therefore the contract is unenforceable.

Section 74 (2) of the Law of Property Act, 1925, is a mere matter of machinery, and provides how a council can execute contracts which come within the common law exceptions of contracts not requiring to be sealed. It does not give additional power for contracting otherwise than under seal. [Reference was made to *Lawford* v. *Billericay Rural District Council*,[3] *Church* v. *Imperial Gas Light and Coke Co.*[4] and *Austin* v. *Guardians of Bethnal Green.*[5]]

The question is whether section 266 has abrogated the rule at common law, and it is submitted that it has not; it merely relates to the domestic matters of the corporation. Accordingly, the contract should have been made under seal.

Salkeld-Green replied.

Cur. adv. vult.

November 9. LORD GODDARD C.J. read the following judgment, in which he stated the facts as set out above, and continued: From very early times in our law the general rule has been that an unsealed contract is enforceable neither by nor against a corporation. To this general rule of the common law there are and probably always have been certain exceptions. In *Church* v. *Imperial Gas Light and Coke Co.*[1] Lord Denman C.J. said: "Wherever to hold the rule applicable would occasion very "great inconvenience, or tend to defeat the very object for "which the corporation was created, the exception has prevailed: "hence the retainer by parol of an inferior servant, the doing of "acts very frequently recurring, or too insignificant to be worth "the trouble of affixing the common seal, are established "exceptions": see also *Austin* v. *Guardians of Bethnal Green.*[2]

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[3] [1903] 1 K.B. 772; 19 T.L.R. 322.

[4] (1837) 6 Ad. & El. 846.

[5] (1874) L.R. 9 C.P. 91.

[1] (1837) 6 Ad. & El. 846, 861.

[2] (1874) L.R. 9 C.P. 91.

1956

A. R. Wright & Son Ltd. v. Romford Borough Council.

Lord Goddard C.J.

The exception applies to both trading and non-trading corporations—*Wells* v. *Mayor, Aldermen and Burgesses of Kingston-upon-Hull* [3]—and to both executed and executory contract, as was laid down in *Church's* case.[4] Further, in the case of non-trading corporations if it is shown that the subject-matter of the contract was connected with the purposes for which the corporation was established and that the party claiming had performed his part of the contract, the law will imply a promise to pay for the benefit requested and received: *Lawford* v. *Billericay Rural District Council* [5] and *Clarke* v. *Cuckfield Union.*[6] Admittedly this case does not fall within any of these exceptions, but Mr. Salkeld-Green has submitted that, if a contract is made in accordance with the standing orders of the council and is signed by someone authorized by the standing orders it is valid notwithstanding the absence of a seal, and for this he relies mainly on section 266 of the Local Government Act, 1933. That section provides (1) that a local authority may enter into contracts necessary for the discharge of any of their functions; (2) all contracts made by a local authority or by a committee thereof shall be made in accordance with the standing orders of the authority. It then enacts that the standing orders shall provide for certain matters, and a proviso is added that a person entering into a contract with a local authority shall not be bound to inquire whether the standing orders have been complied with and that all contracts entered into by a local authority, if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with.

I cannot agree that this section affects the age-old requirement of the common law as to the necessity of a seal to bind a corporation. Had Parliament intended to make so drastic an alteration in the law it would surely have so provided in clear terms. Standing orders deal with the internal affairs of the body making them and, as the proviso shows, do not affect other persons such as those who contract or desire to contract with the corporation. The statute requires that the standing orders shall provide for certain steps to be taken before contracts are made, and the orders provide for the carrying out of these directions. The party contracting or proposing to contract with the corporation is not concerned with whether the corporation has acted in accordance with their standing orders and, if otherwise valid, a contract will be binding though the orders may not have been followed, but I can find no words entitling me to say that if a corporation does comply with their standing orders the seal is no longer necessary either to bind them or to confer contractual rights upon them. It is true that under the repealed section 174 of the Public Health Act, 1875, a contract by an urban authority had to be made under seal only if it exceeded £50 in value or amount, and it may be that though there is no similar provision in the Local Government Act, 1933, that a contract which does not exceed £50 might now be held to be one which, to use Lord Denman's words in *Church's* case,[7] would be "too insignificant "to be worth the trouble of affixing the common seal," a question which can be decided if and when it arises.

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[3] (1875) L.R. 10 C.P. 402.

[4] 6 Ad. & El. 846.

[5] [1903] 1 K.B. 772; 19 T.L.R. 322.

[6] (1852) 21 L.J.Q.B. 349.

So far as section 74 (2) of the Law of Property Act, 1925, is concerned, that authorizes the appointment of someone to sign on behalf of the corporation an agreement not under seal, but that can only refer to the execution of an agreement which would be binding on the corporation in spite of the absence of a seal. These could only be contracts which fall within the exception to which I have already referred, as, for instance, the engagement of a menial servant such as a porter or housekeeper at the town hall or, perhaps, for the purchase of small quantities of goods needed for the day-to-day service of the offices, as they might come within the words "the doing of acts very frequently "recurring,"[7] but this section cannot, in my opinion, in any way validate an agreement which is not under seal and does not fall within the recognized exceptions unless, indeed, it be made under some authority conferred by statute upon the particular corporation. Though it may be distasteful to give effect to a technical defence of this description, it is a valid defence in law and, accordingly, it follows that the action cannot be maintained. There must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: *W. G. R. Saunders, Son & de Wolfe for H. K. Evershed & Co., Leyton, E.10; Sharpe, Pritchard & Co. for J. Twinn, Romford, Essex.*

C. J. E.

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[7] 6 Ad. & El. 846, 861.

C. A.

1956
Oct. 26, 30, 31.

Singleton, Jenkins and Parker L.JJ.

BACCUS S.R.L. *v.* SERVICIO NACIONAL DEL TRIGO.

Conflict of Laws—Sovereign immunity—Corporate body—Separate legal entity—Whether department of state—Law applicable—Waiver of sovereign immunity—Submission to jurisdiction—Entry of appearance and order for security for costs without knowledge or authority of foreign sovereign—Ignorance of legal rights—Whether submission to jurisdiction.

Waiver—Sovereign immunity.

The plaintiffs were a limited company formed under the laws of Italy and carrying on business there; and the defendants carried on business in Spain. On September 16, 1952, the parties entered into two c.i.f. contracts for the sale by the defendants to the plaintiffs of 26,000 tons of rye, each contract containing a term which, as translated, provided "for any divergence which may arise . . . "both parties submit to the jurisdiction of the technical courts at "London."

Disputes arose and on September 9, 1954, the plaintiffs issued a writ out of the jurisdiction claiming damages for breach of contract. On October 20, 1954, an appearance was entered for the defendants by their solicitors in London. On November 19, 1955, the statement of claim was delivered, and on January 30, 1956, an order was made by consent for security for the defendants' costs in the sum of £150. On April 18, 1956, a summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a department of the State of Spain and that that State through its ambassador claimed sovereign immunity. It was admitted by the defendants that they possessed a legal personality, had power to make contracts on their own behalf for the buying and selling of wheat and could sue and be sued in their own name. It was not disputed that, apart from the effect of their incorporation, the defendants would be a department of the Sovereign State of Spain.

Further, the head of the defendants had given instructions to the defendants' solicitors to enter appearance and ask for security for costs without the knowledge or authority of the Spanish Minister of Agriculture, to whom the head of the defendants was directly subordinate, and who, apart from the Cabinet or Head of the State of Spain, was the only person with authority to decide whether the defendants should submit to the jurisdiction of a foreign court:—

Held (Singleton L.J. dissenting), (1) that the defendants were a department of the State of Spain notwithstanding that they were a corporate body and a separate legal entity, and they were, therefore, entitled to claim sovereign immunity.

Per Parker L.J. Whether the defendants are such a department is a matter of Spanish law. There is no ground in English law for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it being a department of State. The court is entitled to assume that Spanish law is the same, in the absence of evidence to the contrary.

Krajina v. *Tass Agency (of Moscow)* [1949] W.N. 309; [1949] 2 All E.R. 274 considered.

Ulen & Co. v. *Polish National Economic Bank* (1940) 24 N.Y. 2d. 201 explained.

(2) That there could be no submission to the jurisdiction unless it were made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign, and, therefore, because the acts of the head of the defendants in instructing solicitors to enter appearance and ask for security for costs had been done in ignorance of his rights and without the knowledge or authority of his superiors, they did not constitute a submission to the jurisdiction.

The Jassy [1906] P. 270 and *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139; 30 T.L.R. 146 applied.

Decision of Pearce J. affirmed.

APPEAL.

The plaintiffs, Baccus S.R.L., appealed from an order of Pearce J., in chambers, dated July 17, 1956, whereby he stayed all further proceedings in the action and set aside the writ and statement of claim therein on the ground that the defendants were a department of the State of Spain, and that the State of Spain, through its ambassador at the Court of St. James, claimed sovereign immunity in respect of the institution and continuance of the action.

The plaintiffs were a limited company formed under the laws of Italy and carrying on business there. The defendants, Servicio Nacional del Trigo, carried on business in Spain. On September 16, 1952, the parties entered into two c.i.f. contracts for the sale by the defendants to the plaintiffs of 26,000 tons of rye. Each contract contained a term which was translated for the benefit of the court as follows: "The sale is made in accordance "with the terms of the Genoa international contract for sale of "cereals No. 5 being a copy of the international contract bearing "the same number. For any divergence which may arise in the "fulfilment or construction of the contract contrary to the afore-"said terms, both parties submit to the jurisdiction of the "technical courts at London."

Disputes concerning shipment of the rye arose between the parties and the plaintiffs claimed damages for breach of contract.

On July 7, 1954, the plaintiffs applied for leave to serve the writ out of the jurisdiction under R.S.C., Ord. 11, r. 1. Bresch, the solicitor to the plaintiffs, swore an affidavit in support

C. A.
1956

Baccus S.R.L. v. Servicio Nacional del Trigo.

of the application in which he deposed that the expression "'technical courts at London' was not quite accurate because "there are no such 'technical courts at London,' but it is fairly "clear that the clause contains a submission to such court at "London as actually exists and this can only be the High Court "of Justice; more particularly a commercial judge thereof. In "any case the said clause discloses the intention that the contracts should be governed by English law." Leave to serve out of the jurisdiction was given, and on September 9, 1954, the writ claiming damages for breach of contract was served.

On October 20, 1954, an appearance was entered for "Servicio "Nacional del Trigo (a corporate body according to the laws of "Spain) the defendants in this action" by the defendants' solicitors in the action. On November 19, 1955, the statement of claim was delivered. On January 19, 1956, the defendants issued a summons for security for costs on the ground that the plaintiffs' registered office was situate out of the jurisdiction. On January 30, 1956, an order was made by consent for security for the defendants' costs in the sum of £150 and that amount was lodged. On April 18, 1956, a summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a department of the State of Spain, and that the State of Spain, through its ambassador, claimed sovereign immunity.

Master Lawrence made an order as prayed and that order was upheld by Pearce J. The plaintiffs now appealed. All the evidence concerning the defendants' status and constitutional position and the laws of Spain in relation to them were contained in the affidavits set out below.

The first affidavit on behalf of the defendants was that of Rafael Valls, a member of the Spanish Bar, permanent delegate of the general council of the Bar of Spain, and a member of the Middle Temple. He deposed: "The 'Servicio Nacional "'del Trigo' (National Wheat Service) is a department of the "State of Spain being a department of the Spanish Ministry of "Agriculture. It was brought into being as a department of the "State by decree law on August 23, 1937. Articles 1 and 2 of "the said decree law read respectively thus:

"'Article 1. The production and distribution of wheat and "'principal similar products are governed by the rules set out "'in this decree law and supplementary enactments, and the

" 'acquisition, distribution and prices thereof are regulated " 'hereby.'

" 'Article 2. In order to carry into effect the above objects, " 'and for purposes of study and submission of proposals for " 'their fulfilment, there is created hereby an organization to be " 'styled " Servicio Nacional del Trigo " as a department of the " 'Commission of Agriculture and Agricultural Labour, of the " 'technical junta of the State or department which eventually " 'takes its place.' The technical junta of the State was the "provisional Spanish nationalist government.

"3. By law of January 30, 1938, the central administration "or government of the State was organized and eleven ministries "were created of which the Ministry of Agriculture was one.

"4. By decree of April 6, 1938, the Ministry of Agriculture "was organized. Article 1 of the decree reads thus: 'Article 1. " 'The Ministry of Agriculture comprises an under-secretariat " 'and the national services of: agriculture' "—and three other heads. "Article 2 enacts that the under-secretariat '. . . shall " 'exercise the functions which appertain to it and those which " 'are conferred upon it by delegation . . . The following shall be " 'a direct department of the under-secretariat . . . Servicio " 'Nacional del Trigo.'

"5. By order of the Minister of Agriculture dated May 30, "1938, the under-secretariat itself was organized. Article 1 "provides thus: 'Article 1: The services which by decree are " 'dependent upon the under-secretariat of the department, " 'are . . . organized in the ordinary sections as hereinafter set " 'out . . . 4. Servicio Nacional del Trigo.'

"6. Finally, the Servicio Nacional del Trigo was reorganized "by order of the Ministry of Agriculture of November 19, 1953. "The following articles confirm that the Servicio Nacional del "Trigo is a department of the State. Article 2 reads: 'The " 'Servicio Nacional del Trigo is an organization which is a " 'department of the Ministry of Agriculture having legal personality for the carrying into effect of such acts and transactions " 'as may be required for the development and execution of its " 'objects.

" 'The Servicio Nacional del Trigo, unless expressly decreed " 'otherwise by this Ministry shall also be dependent upon . . . " '[I think that means "be a department of"] the General " 'Commissariat of Supply and Transport in respect of such " 'activities of the Servicio as may fall within the orbit of this " 'Commissariat.'

"'Article 4. The buying and selling of wheat appertains "'exclusively to the Servicio Nacional del Trigo in respect of the "'importation and exportation of that product decreed by the "'government. It shall also carry out these transactions in "'relation to other cereals when the superior authority so directs "'it.' I say, therefore, that the Servicio Nacional del Trigo is a "department of the State of Spain."

The second affidavit was that of the Ambassador of the State of Spain at the Court of St. James, who deposed: "1. The "defendant herein named Servicio Nacional del Trigo is a "department of the State of Spain, being a department of the "Spanish Ministry of Agriculture.

"2. I am informed and verily believe that the Servicio "Nacional del Trigo entered an appearance to this action on "October 20, 1954, but that the statement of claim was not "delivered until October 25, 1955, and I have seen the correspondence which passed between the plaintiffs' and the "defendants' solicitors in this action as well as the summons "for security for costs issued by the defendants' solicitors on "January 19, 1956, and the order by Master Lawrence made on "January 30, 1956. I am informed by my government and "verily believe that the said entry of appearance and all subsequent events concerning the said department in this action . . . "have taken place without the knowledge or authority of the "Minister of Agriculture (who was then responsible for the said "department and is still responsible for it at this date) and "without the knowledge or authority of the cabinet or of the "Head of the Spanish State. The said Minister (apart from "the Head of the State and the cabinet) is the only person with "authority to decide whether or not the Ministry of Agriculture "or any department thereof shall waive its claim to sovereign "immunity by submitting to the courts of any other State. In "the premises I am informed and verily believe that if the "steps taken by or on behalf of the said defendants constitute "a prima facie submission to the jurisdiction of this honourable "court or a waiver of the sovereign immunity from the process "of this honourable court attaching to the said defendants, then "such submission and waiver have taken place without any "authority by or on behalf of the State of Spain.

"3. It is contrary to the dignity, sovereign immunity and "public policy of the State of Spain to allow a foreign court to "adjudicate upon the rights and obligations of the State or of any "of its departments or to be compelled to submit to the jurisdiction of a foreign court or to permit a continuation of proceedings "instituted against the State or any of its departments in a "foreign court.

"4. The State of Spain does not consent to these proceedings "or to the continuation thereof and has never consented thereto. "Such continuation would constitute a violation of the sovereign "immunity of the State of Spain which I have no doubt this "honourable court will not countenance.

"5. In these circumstances I am instructed by my government on behalf of the State of Spain respectfully to petition this "honourable court to stay all further proceedings in this action "forthwith and to set aside the writ and statement of claim "herein, and I hereby respectfully do so."

The next affidavit was filed on behalf of the plaintiffs and sworn on May 1, 1956, by Jose Colas, Doctor of Law of the University of Madrid and a member of the Spanish Bar. He deposed: "I have been asked to advise on the status of the "Servicio Nacional del Trigo, an autonomous body created in "the year 1937 for the specific function of regulating the production and distribution of wheat and similar products.

"I say that the said autonomous body carries out a particular "service under the supervision and control of the Spanish Ministry of Agriculture, but has a legal personality of its own entitled "to enforce any right acquired in the exercise of its functions, "and also is liable in respect of any liability incurred in the "exercise of the same.

"The Servicio Nacional del Trigo is one of the public bodies "described in Spanish law as 'organismos autonomos,' which I "say must be translated as 'autonomous bodies.'

"The characteristics of these 'autonomous bodies' are:— "(a) independent legal personality. I refer to . . . [the decree-law of 1937, and the official bulletin of August 25, 1937, which "stated]: 'The Servicio Nacional del Trigo has complete judicial "'personality for the carrying into effect of those functions which "'are designated under this decree-law.'

"'The Servicio Nacional del Trigo shall also possess, in the "'carrying into effect of the purposes set out under this decree-law, all the privileges granted by the law in force to such "'farmers syndicates which assume the protection of the law of "'January 28, 1928.'

"Under the said law of January 28, 1928, article 3: 'farmers

" 'syndicates have legal personality as provided in article 38 of " 'the Spanish Civil Code' (Aranzadi 1937, p. 872).

"Article 38 of the Spanish Civil Code: 'Juridical persons may " 'acquire and own any kind of property, and in the same way " 'contract obligations and take civil and criminal action in con- " 'formity with the law and regulations governing their existence.'

"(b) *Power to contract in its own name.* The Servicio " Nacional del Trigo as an independent body acquires rights and " enters into contracts and financial transactions. I refer to " article 4 of the decree of November 19, 1953:—

" 'The buying and selling of wheat appertains exclusively to " 'the Servicio Nacional del Trigo in respect of the importation " 'and exportation of that product as approved by the govern- " 'ment. It shall also carry out these transactions in relation to " 'other cereals when it may be so ordered by the superior " 'authority.'

"Article 8 of the same decree: 'The Servicio Nacional del " 'Trigo, having already obtained the necessary authorization of " 'the council of ministers, may arrange, subject to the legal " 'conditions, for the credit operations which may be necessary " 'for carrying out its commitments.'" Having set out facts in support of the statement he makes that the Servicio Nacional del Trigo had its own independent administration, the deponent concluded by paragraph 3: "For the above reasons I say that the " Servicio Nacional del Trigo has full juridical personality and is " competent to enter contracts and to commence and defend " actions in the English courts."

In reply to that, there was a further affidavit sworn by Rafael Valls on May 11, 1950, in which he said: "The status of " the Servicio Nacional del Trigo is clearly defined in article 2 of " the order of the Ministry of Agriculture of November 19, 1953, " which I have recited in paragraph 6 of my affidavit sworn " herein on April 13, 1956. As an organization dependent upon " and forming part of the Ministry of Agriculture it is not autono- " mous or independent, although it has been granted juristic " personality for carrying into effect its purposes subject to the " decision and control of the Minister of Agriculture (as is " explained in paragraph 5 and 8 hereof) in respect of actions in " which it may be a party. It is autonomous only in the sense " that as a department of the Ministry of Agriculture it has its " own administrative organization. . . .

"The procedure referred to in paragraph 5 hereof is the " procedure which would be applicable if the Servicio Nacional

" del Trigo were involved in proceedings in the Spanish municipal " courts, and such proceedings could only be instituted or " defended by the Servicio Nacional del Trigo with the express " authority of the Minister of Agriculture. In the case of foreign " proceedings, which additionally involve delicate questions of " policy as to whether or not a department of the Spanish State " should submit to the jurisdiction of the courts of another State, " it is equally only the appropriate minister (apart from the " cabinet or the Head of the State) who has authority to decide " whether a department of his ministry should take part in such " proceedings or not. I say this from my own knowledge of the " constitutional practice in such matters as counsel to the " Spanish government over the past 20 years. Accordingly, in " the present case only the Minister of Agriculture (apart from " the cabinet or the Head of the State) had authority to decide " whether or not the Servicio Nacional del Trigo should submit " to the jurisdiction of this honourable court."

Jose Colas swore a further affidavit on May 28, 1956, where he deposed: " I say that the Servicio Nacional del Trigo is an " autonomous body with juristic personality, special resources " different and distinct from those of the State, and an independent budget, and is able to enter into contracts and institute " and defend actions of any kind in the courts of Spain or abroad. " The said autonomous body is subject to the control or supervision of the Ministry of Agriculture, and also to the control of " the Commissariat of Supply and Transport in so far as the " activities or the supervision of the said service are included " within the functions of the service. (Article 2 of paragraph 2 of " order of November 19, 1953.) It is not therefore correct to " say that the Servicio Nacional del Trigo is autonomous only " in the sense that it has its own administrative organization, " because it is effectively exercising the functions of an autonomous body."

The Spanish Ambassador swore a further affidavit on June 4, 1956, in which he said:

" 1. I have been informed by [Rafael] Valls that at the " hearing of the summons dated April 18, 1956, a number of " questions arose in connexion with my affidavit sworn on April " 17, 1956, and I now propose to deal with these.

" 2. I stated in paragraph 2 of my affidavit that I was " informed and verily believed that the Servicio Nacional del " Trigo entered an appearance to the action on October 20, 1954, " and that the statement of claim was delivered on October 25;

C. A.

1956

Baccus S.R.L. v. Servicio Nacional del Trigo.

"1955, and that I had seen the correspondence exhibited to this "affidavit. This information was supplied to me by Messrs. "Vernor Miles & Clark.

"3. In paragraph 2 of the said affidavit I also referred to "certain information given to me by my government. In accord-"ance with international protocol this information was supplied "to me by the Minister of Foreign Affairs upon information in "this case supplied to the said Minister of Foreign Affairs by "the Minister of Agriculture to whom I have referred in the "said paragraph.

"4. I am also informed by Messrs. Vernor Miles & Clark "that this honourable court would like to be informed about the "circumstances in which the Servicio Nacional del Trigo gave "instructions for an appearance to be entered in this action "without the knowledge of the Minister of Agriculture or the "Council of Ministers or the Head of the State notwithstanding "the fact that the Servicio Nacional del Trigo is a department "of the Ministry of Agriculture. The information supplied to me "in the manner referred to in paragraph 3 hereof on this point "is as follows:—

"The Servicio Nacional del Trigo had never previously been "concerned in proceedings in England and on receipt of the "writ ordering it to appear within eighteen days from October "4, 1954, in default whereof judgment would be given against "it, it was somewhat at a loss as to what to do. This procedure "is entirely unfamiliar in Spain where there is no question of "entering an appearance since a defendant is not required to do "anything before delivering a defence once a statement of claim "has been delivered to him. There being no time to comply "with the normal formalities prescribed by article 156 of the "order of November 19, 1953, and article 15 of the regulation "of July 27, 1943 . . . which in practice apply to all litigation "in which any department of the State is involved, including "foreign proceedings, the head of the department Servicio "Nacional del Trigo (Delegado Nacional Senor Cavero) took "it upon himself to safeguard the position by giving instructions "to Messrs. Vernor Miles & Clark to take the necessary steps to "preserve the position. I am informed by Messrs. Vernor Miles "& Clark and verily believe that this was taken to mean that an "appearance should be entered in the usual way. Neither the "Minister of Agriculture nor the Council of Ministers nor the "Head of the State nor I myself was aware of this and the "Delegado Nacional had no authority to give these instructions "for the reasons indicated in paragraph 2 of my previous "affidavit.

"Thereafter the Servicio Nacional del Trigo did not hear "further as to this matter which had apparently been allowed "to remain dormant for a considerable time until Messrs. Vernor "Miles & Clark asked for instructions to enable a defence to be "prepared over a year later. For the first time the matter then "came to the notice of the Minister of Agriculture and after "inquiries my government thereafter gave instructions to me "to ask this honourable court to set these proceedings aside "on the grounds referred to in my previous affidavit. I am "informed in the manner referred to in paragraph 3 hereof and "verily believe that the application for security of costs was "not made with the knowledge or consent of the Minister of "Agriculture or of the Council of Ministers or the Head of the "State but was made upon instructions given by the said "Delegado Nacional upon his being advised by Messrs. Vernor "Miles & Clark that such an application was invariably made in "cases where the plaintiffs resided outside the jurisdiction of "this honourable court.

"5. I am informed by Messrs. Vernor Miles & Clark and "verily believe that at the hearing before Master Lawrence "certain questions arose in regard to the status of the Servicio "Nacional del Trigo particularly in connexion with the translation of article 1 of the order of May 30, 1938, and article 2 "of the order of November 11, 1953, relating to the constitution "of the said Servicio Nacional del Trigo, in which it is referred "to as being 'dependent upon' the under-secretariat and "Ministry of Agriculture. As a former Minister of Agriculture "from 1941 to 1945 and a member of the Spanish Bar I am "able to deal with these matters from my own knowledge. The "words which have been translated as 'dependent upon' are "in Spanish 'dependiente del' in article 2 of the order of "November 19, 1953, and 'dependiente de' in article 1 of the "order of May 30, 1938. The Spanish word 'dependencia' "means 'department' or 'branch' and the words 'dependiente "'del' or 'dependientes de' are synonymous with 'es una "'dependencia de' meaning 'is a department of.'

"6. I am also able to confirm as a former Minister of "Agriculture that the Delegado Nacional is a civil servant who "is a direct subordinate of the Minister of Agriculture and that "the Servicio Nacional del Trigo forms an integral part of the "Ministry of Agriculture."

C. A.
1956

Baccus S.R.L. v. Servicio Nacional del Trigo.

T. G. Roche Q.C. and *A. J. Bateson* for the plaintiffs. Servicio is not a department of the State of Spain. If it is, it is part and parcel of the State and not an agent of it, and having entered appearance and asked for security for costs it has submitted to the jurisdiction. In so far as Servicio is part and parcel of the State of Spain and not an agent of it, the court will not inquire as to its constitution under the laws of Spain to see whether the proper person under those laws has authorized the entry of appearance and summons for security for costs. If the court were so to inquire it would find that the head of Servicio is empowered by the laws of Spain to authorize solicitors to enter appearance and take out a summons. There is no evidence contrary. As an appearance was entered, the onus of proof is on the defendants to show that there was no submission to the jurisdiction.

There are two questions: first, whether the defendants are entitled to immunity; secondly, if so, whether they have waived that immunity. The first question can be subdivided into (a) is the fact of separate juristic personality conclusive of the question, and can the defendants show that English law extends immunity to a juristic personality other than the State itself? and (b) if the mere fact of separate juristic personality is not conclusive, does English law extend immunity to a juristic person engaged in trade?

The defendants are a separate juristic person. They can enter into contracts on their own behalf and can sue and be sued in their own name. On the question whether a separate legal entity is entitled to immunity, the decision in *Krajina* v. *Tass Agency (of Moscow)* [1] affords guidance, but it is not conclusive of the matter. If a government sets up a legal entity with a separate juristic personality the government cannot succeed in a claim for sovereign immunity in respect of the activities of that entity. A government may set up a legal entity with a corporate status to carry on trading activities on behalf of the government but it is not necessarily a part of the State so that it can claim sovereign immunity: see *per* Close J. in *Ulen & Co.* v. *Polish National Economic Bank* [2] and Cohen L.J. in the *Tass* case.[3] Servicio is a separate legal entity. To extend sovereign immunity to a separate legal entity would be an extension of the doctrine of immunity which is not generally recognized, and which the courts will not enforce. There is no recognized acceptance of the claim that sovereign immunity should extend to a legal entity set up by a foreign State even though it be a department of State: see *per* Lord Macmillan and Lord Maugham in *Compania Naviera Vascongado* v. *S.S. Cristina.*[4]

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[1] [1949] W.N. 309; [1949] 2 All E.R. 274.

[2] (1940) 24 N.Y. 2d. 201, 206.

[3] [1949] 2 All E.R. 274, 281.

With regard to waiver, the need to obtain the consent of the Head of the State or the Minister applies only to litigation in the Spanish courts and is a mere question of internal regulation. Once appearance has been entered it is valid even though the one who entered it ignored that internal machinery. The ambassador and Valls say that it is the constitutional practice that only the Head of the State or a minister shall take the decision whether to waive immunity, but they refer to no statute laying that down; nor do they say when constitutional practice acquires the force of law in Spain; nor do they say that that practice was known to the head of Servicio. There are, therefore, doubts whether there was actual lack of authority on the part of the head of Servicio. It is not established here that there was a secret limitation of the authority of the head of Servicio to enter appearance. No one has said on affidavit that he had no authority to enter appearance; they merely say that he had no power to make the decision. That is a vital distinction, because the plaintiffs are not concerned with secret limitations. If he does something which he has ostensible authority to do he is bound by it so far as the plaintiffs are concerned. The Spanish Government created a body with a juristic personality which must act by its officers. That body entered into a contract with the plaintiffs which has a clause saying that all disputes are to be submitted to the courts in London. It was within the power of Servicio to make that contract and within the power of the man who made it. Omnia praesumuntur rite esse acta. No one has ever questioned the right of the person who signed the contract to enter into it.

If this contract is governed by English law there is a representation that the parties will take appropriate steps to submit to the jurisdiction. Whether Servicio is a department of State or not, it has been created a separate legal entity, and, therefore, if it is sued, it cannot enter an appearance in the name of the State of Spain. It must be sued in its own name and someone must have authority to do acts on its behalf, for example, enter appearance. There must be a head of a corporate body, and if he enters appearance he is held out to the whole world as the person entitled to do so on behalf of the body. Here the doctrine of ostensible authority applies. The head of Servicio has ostensible authority to enter appearance, and it cannot affect the position to say that there is an internal regulation to the effect that he cannot enter appearance.

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[4] [1938] A.C. 485, 497, 518.

Michael Kerr for the defendants. Two questions are involved: first, whether the defendants are an entity in respect whereof the State of Spain can claim immunity; and secondly, if so, whether the State has irrevocably submitted to the jurisdiction of the English courts. A third question may be added, namely, whether in the inherent jurisdiction of this court the action should be allowed to proceed when no useful result can be achieved by it, since any judgment would be unenforceable.

On the first question there are five points: (1) The statement of the ambassador that the defendants are a department of the State of Spain is uncontradicted by any evidence. In those circumstances the plaintiffs' argument that the defendants are not entitled to immunity fails in limine on the decision in the *Tass* case.[5] (2) If that be wrong, one must examine the evidence to see what the defendants' position is. An analysis of the evidence shows that the defendants are not a legal entity separate from the State of Spain. This case is therefore covered by the *Tass* case.[5] (3) The defendants are not a corporation, but, even if they are to be treated as such, this does not necessarily imply that they are separate and distinct from the State and thus deprived of immunity. This point is covered by the obiter dicta of Cohen and Tucker L.JJ. in the *Tass* case [6] and is based on our own constitutional practice. (4) It is irrelevant that the State of Spain trades through the defendants. (5) Even if the defendants are a corporation, and even if it is separate from the State of Spain, if they are formed for public purposes and under the control of the State, the State is entitled to claim immunity on their behalf in foreign courts.

The first question may be summed up in the following way: Servicio is a department of the State of Spain. A legal entity is not necessarily separate from the State. The Ambassador has said that Servicio is a department of the Ministry of Agriculture, and nowhere is it suggested that that is not so. (For the effect of this, see the *Tass* case, *per* Cohen and Tucker L.JJ.[7]) There can be a department of State which is also incorporated, but it does not thereby cease to be a department of State. If it is a department of State which is incorporated, there must be a right to claim sovereign immunity if it is impleaded: see Martin Wolf, Private International Law, p. 56. Tucker L.J. in the *Tass* case [8] is saying that if an ambassador says that the defendants are a department of State, the onus is on the plaintiffs to show that it is a separate legal entity which is not entitled to immunity. A department of a foreign sovereign State is entitled to immunity, however it is constituted. See also *per* Cohen L.J. in the *Tass* case.[9] So long as it is possible for a body to be a department of State notwithstanding that it is a corporate body, the statement of the ambassador stands, and it stands unless the plaintiffs can prove both (a) that Servicio is a corporation, and (b) that it is separate from the State of Spain. There is, however, no challenge that Servicio is a department of State and that lack of challenge is conclusive that Servicio is a department of State. The history and constitution of some of our Government Departments—notably the Ministries of Health and Transport—show that by English constitutional law a Government Department can also be a corporate entity. It must, therefore, be entitled to immunity in a foreign court, and different treatment cannot be accorded to a department of a foreign State in a similar position.

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[5] [1949] 2 All E.R. 274.

[6] Ibid. 281, 284.

[7] Ibid. 276, 281.

With regard to the question of waiver, there can be submission to the jurisdiction only if it is made with full knowledge of the facts and with the consent and authority of the State. In this case the writ was void ab initio; writs issued against diplomats are void ab initio by statute, namely, the Diplomatic Privileges Act, 1708. That Act must be taken as declaratory of the existing law, and the degree of protection afforded to diplomatic personnel under the Act cannot be regarded as superior to the degree of protection afforded to a foreign sovereign. If, under that Act, therefore, a writ issued against a foreign diplomat is void ab initio, a fortiori a writ issued against a foreign sovereign is void; and if, as is submitted, Servicio is a department of the State of Spain, the writ in this case was void ab initio and could only become a valid process if the State did something to bring it to life: see *The Parlement Belge.*[10] In *In re Republic of Bolivia Exploration Syndicate Ltd.*[11] Astbury J. held that a diplomat could waive his right to immunity even though the writ was null and void, but that such waiver must be strictly proved. To waive rights there must be full knowledge of them and an unequivocal intention to waive them: see *The Jassy.*[12] These cases show that the person who purports to waive the immunity can only do so with the knowledge and consent of the sovereign to whom the immunity appertains. In the absence of such knowledge and consent the waiver is ineffective and the proceedings have never been validated. Here the head of Servicio had no authority to waive the State's immunity and the instructions he gave to the solicitors were null and void and of no effect.

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[8] [1949] 2 All E.R. 274, 283, 284.

[9] Ibid. 280, 281.

[10] (1880) 5 P.D. 197.

[11] [1914] 1 Ch. 139; 30 T.L.R. 146.

[12] [1906] P. 270.

A submission to the jurisdiction of foreign courts made on behalf of a foreign State is not effective to validate proceedings against that State unless it was made by someone having the authority of the foreign State to waive its immunity. Sovereign immunity is personal to the State and can be waived only by those to whom it is expressly delegated. The question is whether that exercise of sovereign power was here properly exercised by the person in question. If the State of Spain did not in fact consent to this submission, because the head of Servicio had no authority to submit, then the courts cannot treat the State of Spain as having submitted. An intention to submit cannot be attributed to the State. Only if it be clear that the State itself had the intention to submit will it be deemed to have submitted: see *Kelantan Government* v. *Duff Development Co.*[13] If the person has no authority to submit by constitutional law he cannot be held to have authority by implication.

Where a sovereign State is entitled to and claims immunity on behalf of a defendant, but it is held that on the facts a submission to the jurisdiction by or on behalf of the defendant had already been made before the plea of immunity is raised, so as to amount to a waiver of the immunity on behalf of the sovereign State, the court will not allow the action to continue if it is satisfied that the sovereign State does not recognize the purported submission to the jurisdiction and contends that such submission was without its authority and consent. The court will, in such a case, stay the action under its inherent jurisdiction for the reasons stated by Astbury J. in *In re Republic of Bolivia Exploration Syndicate Ltd.*,[14] namely, that the continuation of the action would only serve the purpose of defining liabilities in a case in which there could be ex hypothesi no enforcement against the defendant.

A. J. Bateson in reply. The question whether Servicio is a department of State is a question for the court to decide on the evidence before it and not a question for the Spanish Ambassador.

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[13] [1923] A.C. 395.

[14] [1914] 1 Ch. 139, 142 et seq.

[SINGLETON L.J. In the *Tass* case [15] Cohen L.J. said that the best evidence was the affidavit of the ambassador.]

The Spanish Ambassador said that Servicio could be a department or *branch* of the Ministry of Agriculture, and a branch may be a separate legal entity entitled to sue and be sued. The court must decide as a matter of English law whether this entity is covered by the cloak of immunity. It would be an extension of the doctrine of sovereign immunity to say it is so covered because it is a separate legal entity and because it carries out commercial transactions.

On the question of waiver, here the entry of appearance was done unequivocally. *The Jassy* [16] is no authority for the proposition that the authority of the agent is not equivalent to the knowledge of the principal in cases involving sovereign immunity. It only shows that the agent had no authority. Furthermore, the case leaves open the question what is the authority of the head of a department of a foreign State. It is submitted that he has authority to enter appearance. If the head of Servicio intended to submit, that is an end of the matter: see the *Kelantan* case.[17] Once a prima facie case of waiver is made out, the onus is on the defendants to show that they did not know the effect of the steps they had taken. There is no evidence that they did not know. Waiver may be implied if a person so acts that it would be inequitable for him to enforce the right he now claims. Mr. Kerr said that it was constitutional practice or convention for the head of Servicio to get the leave of the Minister to submit to the jurisdiction. But even if the head of Servicio did not apply that practice he was not bound to do so, as constitutional conventions are not enforced in the courts. On the question of immunity the plaintiffs rely on the observations of Lord Maugham and Lord Macmillan in *The Cristina*.[18]

SINGLETON L.J. stated the facts, and continued: The first question which arises is: are the defendants entitled to sovereign immunity? The second is: if so, have they waived their right to claim sovereign immunity by submitting to the jurisdiction of this court? Before I deal with the principles involved I will make certain comments on the facts. There may be some questions as to what is the meaning of the expression "has full "juridical personality" used by Colas in his affidavit of May 1, 1956. I would take it as a legal entity—that it has most, if not all, the rights of a limited company in this country. Further, it is interesting to notice that the translation of the contracts which were made "on behalf of the sellers World Commerce Corporation S.A.," copies "seen and approved by Servicio Nacional del Trigo," have underneath the words "illegible signature." I asked who it was who had signed the contract, as I thought we ought to know. Unfortunately that has not been discovered. The person who signed, having seen and approved these contracts, for the defendants, must have been of some importance, since the amount involved is about £600,000. The words at the end of the jurisdiction clause are "tribunales, technicos de Londres," which is said in the uncontradicted affidavit of Bresch to have been a submission to the technical courts at London. I do not know who, on behalf of the defendants, would have power to agree to such a term, but it would be interesting to know who it is who signed the contracts on behalf of the defendants and what was his position with them.

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[15] [1949] 2 All E.R. 274, 280.

[16] [1906] P. 270.

[17] [1923] A.C. 395.

[18] [1938] A.C. 485, 497, 518.

Again, when the ambassador deposes, in paragraph 4 of his second affidavit, that the Servicio Nacional del Trigo was somewhat at a loss as to what to do, I should be interested to know who there was to consider the matter when a writ was served upon them calling for an appearance to be entered in England. Later His Excellency refers to "the head of the department Servicio Nacional del Trigo (delegado nacional Senor Cavero)." We were told by counsel that that gentleman was head of that branch of the civil service in Spain and it was he who took upon himself to safeguard the position by giving instructions to the solicitors. What happened after that we do not know. I imagine in such a case there would be a request for the solicitors to be put in funds, though I do not know. If there was such a request, what was done: who found the money? More than a year elapsed between the service of the writ and the taking of this point as to sovereign immunity, and considerable costs must have been incurred. Again, apart from the extracts from various decrees which are referred to in the affidavits, we know nothing as to what the defendants did. We are told they are a department of the Ministry of Agriculture; they sold or purported to sell 26,000 tons of rye to an Italian company for shipment to various Mediterranean ports. What else they did and what sort of authority, general or special, they had, we do not know. In my opinion we ought to have had further information upon a matter of this kind before being asked to come to a decision.

Upon the affidavits of the ambassador, the defendants were a department of the Ministry of Agriculture of the State of Spain: but I think they were not a department in the ordinary sense. They were a separate legal entity, a juridical personality. What rights to trade had they? Who conducted their operations? What authority was he given? For what purpose was Servicio Nacional del Trigo formed? What are its powers? Who gave instructions for the entry of an appearance? Was that something done in the nature of the usual course of business? It is said that they had not had an English writ served on them before. There must have been over the years, some proceedings for or against Servicio Nacional del Trigo. Who acted on those occasions? The position seems to me to be unusual by reason of the fact that there is the interposition of the legal entity. Mr. Kerr, on behalf of the defendants, said it was not described as a separate legal entity; but it is described throughout in that way, whether you call it a juridical or juristic person or an entity. What powers the head of the department or the one who made this contract had we do not know. But if a man has power to make a contract in these terms, he must be a person of some responsibility; and if Senor Cavero, the head of the department, is properly described as one of the heads of the civil service, I should regard him as a person to whom the ordinary business of the legal entity is entrusted. One might well think that it would be his duty to do what was necessary to protect the interests of the body over which he presided.

With those thoughts in mind, I come to the authorities, none of which, in my view, covers this case completely, on either head. Perhaps the nearest to the present case is *Krajina* v. *Tass Agency* (*of Moscow*).[1] The headnote reads: "On June 2, 1948, "the plaintiff issued a writ claiming damages for an alleged libel "in an article in a weekly newspaper published by the first defen- "dants [the Tass Agency] on May 7, 1948. After entering a "conditional appearance the first defendants applied to the court "to set aside the writ on the ground that they were a department "of the Soviet State and as such immune from suit. In those "proceedings it was shown that in June, 1938, particulars were "filed under the Registration of Business Names Act, 1916, by "the second defendant, an English subject. The business was "described as a telegraphic news agency, and in the particulars "appended to the application it was stated 'the business name "'and address of the foreign firm as agent for whom the business

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[1] [1949] 2 All E.R. 274; [1949] W.N. 309.

" 'is carried on: Tass Agency, Moscow, U.S.S.R.' On July 2, " 1948, a month after the issue of the writ, further particulars " under the Act were filed which showed that the second defen- " dant had ceased to carry on the agency in August, 1946, and " gave the name of another person, B. In these second par- " ticulars it was not stated that the agency was being carried on " as agent for a Russian firm. By clause 15 of the Russian " statute establishing the Tass Agency it was provided that the " agency should enjoy all the rights of a juridical person, and " the Soviet Ambassador in Great Britain certified that the " agency constituted a department of the Soviet State 'exercising " 'the rights of a legal entity.' The master ordered the writ " against the first defendants to be set aside and his decision was " affirmed by Birkett, J. On appeal:—*Held*, (i) having regard " to the certificate of the ambassador that the Tass Agency was " a department of the Soviet State, the burden of disproving that " the agency constituted such a department was on the plaintiff; " the question must be decided by Russian law; and the contents " of the particulars under the Registration of Business Names " Act, 1916, did not establish that the agency was an independent " corporation liable to suit in the English courts; (ii) although " the Soviet statute provided that the agency should enjoy all " the rights of a juridical person and the Soviet Ambassador had " certified that the agency had the rights of a legal entity, no " evidence was before the court to show what were the essential " requisites of a separate juridical existence under Soviet law; " (iii) even if the agency was a State department having a " separate entity, it did not follow that the Soviet Government, " by procuring its incorporation, had deprived it of the right to " assert the immunity normally attaching to a department of a " foreign State under international law, and, accordingly, the " appeal must be dismissed."

It is to be observed that in the present case, though there is evidence that Servicio Nacional del Trigo was a department of the Ministry of Agriculture of the State of Spain, there is also evidence, which is accepted on both sides, as far as I understand, that it was a juristic person or a legal entity under the laws of Spain. In that respect the case is different from the *Tass* case,[2] and the point which here arises was there left open, as I think, though Cohen L.J., who gave the first judgment, expressed an opinion which gives rise to the third holding.

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[2] [1949] 2 All E.R. 274.

Cohen L.J., in the course of his judgment, said[3]: "It seems "to me that the evidence as to the nature of Tass must depend "on its constitution and must be a question of Russian law, "and that we must look at the Russian statutes and to any "relevant evidence that is adduced as to Russian law (and "for all practical purposes in this case, that is nil) to determine whether or not Tass is a separate legal entity." And again[4]: "Turning to the present case, it seems to me that, "on the evidence, Tass falls, so to speak, in a lower category "so far as liability is concerned than does the Minister of "Health. Our attention has been called to nothing which can "be said to amount to a declaration that Tass is a corporation "sole." After a reference to the American case, *Ulen & Co.* v. *Polish National Economic Bank*,[5] Cohen L.J. said[6]: ". . . the "Polish National Economic Bank had been formed as a share "company with commercial objectives, and it was plain from "the whole history of the matter that the Polish State had "intended to make it, not a department of State, but a commercial body which could be used by a department of State. ". . . We were referred to certain other cases, which I do not "think I need go through in detail. The inference I should "draw from these American cases is (and to this extent I do "not think I should quarrel with it) that a sovereign government may so incorporate a particular department of State as "to make it plain that it is to be an ordinary trading, commercial, "or business activity and not to be part of the State so that it "can claim immunity, but I think it would be wrong to infer "from these authorities, and I should not, without further "argument, be prepared to accept the view, that it necessarily "followed that, because a department of State was granted "incorporation, it was deprived thereby of the right to assert its "sovereign immunity in foreign courts. I need not say anything "more on that aspect of the question in view of the conclusion "which I have reached on the main point, that the evidence does "not satisfy me in this case that Tass was a separate legal entity.

"I desire to say one word more on the last point in the "argument of counsel for the plaintiff that the evidence was "ambiguous and self-contradictory, and that, as the onus of "establishing their right to immunity is on the defendants, their "application must fail. I think that turns upon what I have "already said, that, in my view, the defendants do establish that

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[3] [1949] 2 All E.R. 274, 279.
[4] Ibid. 280.
[5] (1940) 24 N.Y. 2d. 201.
[6] [1949] 2 All E.R. 274, 281.

"Tass was, and in essence is, a department of State to the "necessary extent to shift the onus of proving that they were "a separate legal entity to the plaintiff. That onus, in my "opinion, he has failed to discharge. For these reasons I think "that the decision of Birkett, J., was right and ought to be "affirmed."

Tucker L.J. said [7]: "The sole question is whether a body "called the Tass Agency of Moscow has established that it is "part and parcel of a sovereign independent State, namely, the "Union of Soviet Socialist Republics. It is common ground "that the onus of establishing that lies on them. Furthermore, "it is common ground that the certificate of their ambassador in "this country is not conclusive of the matter, though, no doubt, "it is evidence of a very high evidential value, and, in a matter "of this kind, I think it is probably the best kind of evidence "that can be procured."

He added [8]: "On that evidence we have the statement by "the Russian ambassador that the Tass Agency constitutes a "department of the Soviet State—that is the Union of Soviet "Socialist Republics—exercising the rights of a legal entity. "There is nothing in the affidavit of Mr. Andrienko which assists "the court in any way whatever. It merely consists of a "summary of the effect of the statute creating the Tass Agency. "In substance, in this case, apart from the entries in the Business "Names Register, we have to deal with the matter on the "ambassador's certificate, drawing our inferences to the best of "our ability from looking at the translation of the statute.

"The principal point made by counsel for the plaintiff is that "the statement that Tass Agency constitutes a department of "the Soviet State is contradicted or nullified or made ambiguous "by the further statement that it exercises the rights of a legal "entity. The first question is: Has counsel for the plaintiff "established (and the onus is on him in this respect, having "regard to the statement of the ambassador) on the material on "which he has to work that by Russian law the Tass Agency is "a separate legal entity? . . .

"Those are the considerations to which we should have to "apply our minds if we were considering this matter under English "law. No doubt, there are other similar considerations which "may fall to be considered under Soviet law for the purpose of "deciding whether or not a separate status has been acquired. "We do not know what the tests in Soviet law are with regard

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[7] [1949] 2 All E.R. 274, 281.

[8] Ibid. 283, 284.

"to this matter. All we know is that this organization exercises, "or has, the rights of a legal entity, or, putting it the other way, "that it enjoys all the rights of a juridical person. Whether it "may be sued, we do not know, nor, as I have said, do we know "what are the essential requisites of a separate juridical existence "in Soviet law. Therefore, I think that these passages are not "sufficient to establish the submission of counsel for the plaintiff "that Tass had a separate legal existence.

"I agree with Cohen, L.J., that, if that submission had been "established, the plaintiff would not necessarily have succeeded "in this appeal, and I should desire to reserve for future con"sideration the question whether or not the mere fact of a "separate legal existence is necessarily inconsistent with the "entity being part and parcel of a sovereign independent State."

In the course of my judgment in the same case I said[9]: "So far as I can see, there is no precedent for extending immunity "to a corporate body carrying on business in this country, and "I should wish for further argument before deciding that it could "be so extended." I added some words used by Scrutton L.J. in the *Porto Alexandre* case[10]: "Now this State and other States "proceed in their jurisprudence on the assumption that sovereign "States are equal and independent, and that as a matter of "international courtesy no one sovereign independent State will "exercise any jurisdiction over the person of the sovereign or the "property of any other sovereign State; and now that sovereigns "move about more freely than they used to, and do things which "they used not to do, and now that States do things which "they used not to do, the question arises whether there are any "limits to the immunity which international courtesy gives as "between sovereign independent States and their sovereigns. I "think it has been well settled first of all as to the sovereign that "there are no limits to the immunity which he enjoys. . . .

"I quite appreciate the difficulty and doubt which Hill, J., "felt in this case, because no one can shut his eyes, now that "the fashion of nationalization is in the air, to the fact that "many States are trading, or are about to trade, with ships "belonging to themselves; and if these national ships wander "about without liabilities, many trading affairs will become "difficult. . . . These are matters to be dealt with by negotia"tions between governments, and not by governments exercising "their power to interfere with the property of other States "contrary to the principles of international courtesy which govern

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[9] [1949] 2 All E.R. 274, 285.

[10] [1920] P. 30, 36, 37, 38, 39.

C. A.
1956

Baccus S.R.L. *v.* Servicio Nacional del Trigo.

Singleton L.J.

"the relations between independent and sovereign States. While "appreciating the difficulties which Hill, J., has felt, I think it "is clear that we must, in this court, stand by the decision "already given, and the appeal must be dismissed."

In the *Tass* case [11] I drew attention to the importance of those words of Scrutton L.J.[12] used many years ago and I said [13] that they were more important in 1949 than they were when they were uttered because of the increasing changes of the character referred to by the Lord Justice. The same applies today.

I regard a claim to extend sovereign immunity to a separate legal entity as an extension or as a claim to extend the doctrine. I do not think there ought to be a one-sided extension.

In *Compania Naviera Vascongado* v. *S.S. Cristina* [14] there are, in two speeches, passages which I would like to read, for they show how I view the matter. Lord Macmillan said [15]: "Now, it is a recognized prerequisite of the adoption in our "municipal law of a doctrine of public international law that "it shall have attained the position of general acceptance by "civilized nations as a rule of international conduct, evidenced "by international treaties and conventions, authoritative text-"books, practice and judicial decisions. It is manifestly of the "highest importance that the courts of this country before they "give the force of law within this realm to any doctrine of inter-"national law should be satisfied that it has the hallmarks of "general assent and reciprocity."

Lord Maugham, having referred to the judgment in *The Parlement Belge*,[16] said [17]: "As I read the judgment, which "largely followed the reasoning of a remarkable judgment by "Marshall C.J. in the Supreme Court of U.S.A. in *The* "*Exchange*,[18] two things have to be established to found the "immunity, first, that to permit the action to proceed would be "incompatible with the royal dignity of the foreign sovereign or "Government, and secondly, that the immunity was one univer-"sally recognized in foreign countries. I would myself prefer to "say 'almost universally' recognized, for a few exceptions would "not, I think, affect the matter; but I hold a strong opinion "that the Court of Appeal was right in insisting as a condition

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[11] [1949] 2 All E.R. 274, 285.

[12] [1920] P. 30, 36, 37, 38.

[13] [1949] 2 All E.R. 274, 285.

[14] [1938] A.C. 485; [1938] 1 All E.R. 719; sub nom. *The Cristina*, 54 T.L.R. 512.

[15] [1938] A.C. 485, 497.

[16] (1880) 5 P.D. 197.

[17] [1938] A.C. 485, 518.

[18] (1812) 7 Cranch 116.

"of immunity on the adherence of other foreign Governments to "the same rule as to immunity."

C. A.
1956

Baccus S.R.L. v. Servicio Nacional del Trigo.

Singleton L.J.

I know of no case which goes as far as does the claim made by the defendants here. I cannot find that it has been almost universally recognized that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity. The claim goes further than has been generally recognized, and, in the interests of good government, and in the interests of business relationship and business dealings throughout the world, I do not think that the claim ought to be allowed on the material before us. In one of his affidavits the ambassador speaks of how the courts, he feels sure, would regard any trespass on the sovereign immunity of the State of Spain. I feel quite sure that the courts of this country would not knowingly do anything which they understood to be a violation of the sovereign immunity of the State of Spain, but the position is wholly different, it seems to me, if a separate entity is set up and is allowed to trade with its own people conducting its business. One is not trespassing upon sovereign immunity in saying that the body so created should not have the immunity granted to a foreign sovereign or to a foreign State.

I would refer to the report of *Ulen & Co.* v. *Polish National Economic Bank*,[19] a decision of the Court of Appeal of the State of New York. I read part of the report[20]: "The government of "the United States and the governments of friendly foreign "nations are immune from suit, the domestic sovereign on the "historic principle that no court has power to command the "King, and the foreign sovereign on implied consent of all "sovereigns as a matter of comity.

"Theoretically, immunity of domestic sovereign from suit is "a matter of right, while immunity of foreign sovereign is a "matter of favor; but, since the favor is reciprocal, one immunity "is, in practice, as obligatory upon the judicial branch as the "other.

"A corporation organized by either a domestic or a foreign "government for commercial objects in which the government is "interested does not share the sovereign's immunity from suit.

"A bank created by Republic of Poland as a State institu-"tion, but as a 'distinct legal person possessing the right of

[19] 24 N.Y. 2d. 201.

[20] Ibid.

" ' autonomous legal representation,' whose stock was owned by " the State, municipalities, and State and municipal enterprises, " was not immune from suit on interest coupons attached to " bonds issued by it and guaranteed by the Polish Government."

I recognize that upon the facts that case is by no means the same as that which is before this court, but I feel that it is right that I should refer to it, and I shall read a part of the judgment of Close J., who gave the judgment of the five members of the court who were sitting. He said [21]: " There appears to be no " decision in either the United States Supreme Court or in the " New York Court of Appeals dealing with corporations formed " by foreign governments. There are several such cases, how- " ever, in the lower Federal Courts in which the same conclusion " has been reached as in the case of domestic governmental " corporations. In *Coale* v. *Société Co-op. Suisse Des Charbons,* " *Basle, D.C.,*[22] the defendant was a corporation formed " by the Swiss government for the importation of coal. The " charter and by-laws were subject to governmental approval. " The government appointed seven of the seventeen directors, " and was entitled to all the net profit above six per cent. The " plaintiff sued on a contract of sale which had been signed in " the defendant's behalf by the Swiss Minister. The defendant " claimed immunity. The District Court held that the defendant " was not immune from suit and was liable on the contract. A " similar conclusion was reached in *United States* v. *Deutsches* " *Kalisyndikat Gesellschaft* [23] in the case of a corporation formed " and controlled by the French Government for the purpose of " exploiting potash mines in Alsace. It was held that a [24] ' suit " ' against a corporation is not a suit against a government merely " ' because it has been incorporated by direction of the govern- " ' ment, and is used as a governmental agent, and its stock is " ' owned solely by the government.'

" We approve the principle of these latter cases and conclude " that a corporation organized by either a domestic or foreign " government for commercial objects in which the government " is interested, does not share the immunity of the sovereign. " There is a dispute in the present case as to whether the defen- " dant is a corporation, but it is of no actual importance whether " it be called by that name or not. It has all the characteristics " of a corporation. For present purposes the most significant " fact is that the Bank is described in its own charter as ' a

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[21] 24 N.Y. 2d. 201, 206.

[22] (1921) 21 Fed. 2d. 180.

[23] (1929) 31 Fed. 2d. 199.

[24] Ibid. 202.

"'distinct legal person.' Since it is a person quite distinct from "the Polish government, the reasoning employed in the foregoing "authorities with respect to corporations applies with equal force "to the defendant. This characteristic also distinguishes the "present case from certain authorities cited by the defendant. "Thus in *Oliver American Trading Co.* v. *Government of United* "*States of Mexico*,[25] where the plaintiff sued on a contract made "with the National Railways of Mexico, it appeared that there "was no corporation or legal person existent under that name. "'National Railways of Mexico' was merely a name for a system "of railroads, directly owned and controlled by the Mexican "government. Accordingly it was held that the foreign government was entitled to prevail in its claim to sovereign immunity. "The same feature was present in *Dexter & Carpenter* v. *Kunglig* "*Jarnvagsstyrelsen*,[26] which involved the Swedish State Rail-"ways; and in *Mason* v. *Intercolonial Railway of Canada*[27] . . . "where the railroad was owned directly by the King of England. ". . . Having concluded that the defendant is not immune from "suit, we do not reach the question of whether immunity was "or could be waived by the provisions of the trust agreements."

That decision seems to me to make it quite clear that there is no recognized acceptance of the claim made by the defendants in this case that the sovereign immunity should extend to a corporation or to a legal entity set up by a sovereign State, even though it be a department of State. As I have said, I think so to hold would be extending the principle, for which I see no sound reason.

On the second point, it is claimed by Mr. Roche, on behalf of the plaintiffs, that even if it could be said that the defendants were entitled to have succeeded on the claim of sovereign immunity, they had submitted to the jurisdiction of this court and so waived that right. On looking at the facts of this case, I should have thought that they had done so. The solicitors now appearing for the defendants were instructed to enter an appearance, and they entered an unconditional appearance; they were instructed to ask for an order for security for costs, and that was done long before the defence of sovereign immunity was set up. The ambassador states his view of the defendants and of the powers that certain people within or under the Ministry of Agriculture have. It seems to me that on the facts of this case there is a wholly different position to that which has been considered in any other case on this branch of the law. Prima facie, only certain people have authority to waive a right which is the right of the Government; but if the Government or the State goes outside the ordinary practice and founds a separate company or juridical or juristic person to do its business, one would expect it to leave the carrying on of the business to the body or entity which it has set up. The business would include the making and, perhaps, the breaking of contracts. There is no affidavit from the gentleman who made the contract as to how he came to put the clause concerning disputes into the contract. There is no affidavit from the head of the department, the senior civil servant who gave instructions to the solicitors. It might well be that one would find that he was carrying out his normal duty. We do not know. Although we have had cited to us authorities to show that in an ordinary case only a person authorized to waive diplomatic privilege can do so, I am not satisfied upon the evidence in this case that the gentleman who gave instructions to the solicitors had no such power. I should have thought it was in the ordinary course of his duty to instruct solicitors to put in a defence, to enter an appearance, or to ask for security for costs. If that was a submission to the jurisdiction, I do not see why it should not be held that he was acting in the ordinary course of business left to him, or why it should not be held that he on behalf of the defendants had waived their right, or the right of the State to claim sovereign immunity. Notwithstanding those two authorities—*The Jassy*[28] and *In re Republic of Bolivia Exploration Syndicate Ltd.*[29]—I feel that, in view of what happened in this case, the defendants ought not to be allowed to take the point, even if this was a case to which sovereign immunity would apply, for they themselves, in my judgment, had submitted to the jurisdiction. The State of Spain created the defendants as a legal entity and enabled them to trade with citizens of, or with corporate bodies in, other countries. In such a case the defendants ought to be bound by the ordinary practice. We do not know what view the head of the department took of his powers. A State may create many such trading entities and if they act in the ordinary course it ought not to be open to the State to say they were not authorized so to do. Otherwise trading and business relationships would become impossible.

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[25] (1924) 5 Fed. 2d. 659, 661.

[26] (1930) 43 Fed. 2d. 705.

[27] (1908) 197 Mass. 349.

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[28] [1906] P. 270.

[29] [1914] 1 Ch. 139; 30 T.L.R. 146.

Mr. Kerr directed our attention to some words in the judgment of Astbury J.[30]: "Thirdly, I am far from satisfied that a "subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear "that, whatever knowledge R. E. Lemke possessed, the objection on the ground of privilege is now taken with the sanction "and at the instigation of the Peruvian Legation."

In this case the point is taken at the instance of the Spanish Government a year or more after the defendants would appear at first sight to have submitted to the jurisdiction of this court. It would be amazing if it were right to say, as Mr. Kerr claims, that a company or entity in the eyes of the law of Spain could have appeared before the court of first instance, and if they had lost and if their appeal had been dismissed in this court, they could have gone to the House of Lords and there successfully claimed sovereign immunity.

In my judgment the appeal should be allowed.

JENKINS L.J. I regret that I find myself unable to agree with the conclusions at which my Lord has arrived in this difficult case. The questions in the case are, first, whether the defendants, Servicio Nacional del Trigo, were entitled to the sovereign right of immunity from suit as a department of the Sovereign State of Spain? ; and, secondly, if the defendants could otherwise claim such a right, whether they have, on the facts of this case, waived it by submitting to the jurisdiction of the court? The first question can be sub-divided into two further questions: first, are the defendants a department of the Sovereign State of Spain, or would they be such apart from the effect of their status as a corporate body?; secondly, are they disqualified from ranking as a department of the Sovereign State of Spain by reason of the fact that they are a corporate body possessing what is called in the evidence, a juristic personality, or, in other words, because they are a separate legal entity?

As to the first part of the first question, it is not disputed that, apart from the effect of their incorporation, the defendants would be a department of the Sovereign State of Spain. The evidence which my Lord has read in full shows, to my mind, quite clearly that the defendants were formed as a department of State. But it is said that the defendants were invested by the laws of Spain with a juristic personality or corporate status of their own, and that it is impossible for any separate legal entity such as the defendants to be a department of a Sovereign State. It is said that once one reaches the conclusion that the defendants are a separate legal entity, corporation or juristic personality, then they cannot be a department of the State, but must by definition be an independent entity. That is the plaintiffs' argument on this part of the case, and they contend as a general proposition that immunity cannot be claimed on behalf of a separate legal entity engaged in trading activities, even though the government of the Sovereign State concerned is interested in those activities. The question is a difficult one, and there has as yet been no authority providing an answer to it. It arose in the *Tass* case [31] to which my Lord has referred, but for the reasons which have apppeared from his judgment it was not necessary to decide the point which was reserved for future consideration. In so reserving it, Cohen L.J. said that he would not without further argument be prepared to accept the view that it necessarily followed that because a department of State was granted incorporation it was deprived thereby of the right to assert its sovereign immunity in foreign courts.

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[30] [1914] 1 Ch. 139, 156.

In my view of the evidence, it is reasonably plain that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded that status for the purposes for which they were formed; and the purposes for which they were formed were, briefly, the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of State. Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong. In these days the Government of a Sovereign State is not as a rule reposed in one personal sovereign: it is necessarily carried out through a complicated organization which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery. If it seemed good to a foreign State—

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[31] [1949] 2 All E.R. 274.

let us say Ruritania—possessed of a navy to put the affairs of the navy in the hands of a navy board—let us say, the Ruritanian Navy Board—and to enact that the members for the time being of this board should constitute a juridical person or corporation for the purposes of doing all things necessary for the maintenance and efficiency of the Ruritanian Navy, it seems to me impossible to suppose that an action brought against the Ruritanian Navy Board could be held not to infringe the sovereign immunity of Ruritania because, simply as a matter of convenience and administrative machinery, the duties appertaining to the affairs of the Ruritanian Navy had been put in the hands of an incorporated board. I appreciate that the immunity here claimed is an immunity against direct impleading, so that there is, at first sight, force in the argument that the immunity has no application whatever because the party being sued is not the Sovereign State, but is a separate legal entity or corporation which cannot in its own person claim any immunity at all. The answer to that, I think, is this, that once it is found on the evidence that the party sued is in truth a department of a Sovereign State, albeit itself a corporate body, then the suit becomes, or it becomes apparent that the suit in truth is one, between the plaintiff and the foreign Sovereign State or the part of the foreign Sovereign State represented by the departmental body concerned. Each case must no doubt depend on its own facts, and it is not to be taken as following from what I have so far said that every corporation in which a foreign Sovereign State may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign Sovereign State, becomes itself a department of State.

I think the explanation of *Ulen & Co.* v. *Polish National Economic Bank* [32] is that the cases there considered were for the most part cases—as was the actual case in hand—in which the body in question had been set up for ordinary trading purposes and without the intention of constituting it a department of State. That was the view taken by Cohen L.J. when he dealt in the *Tass* case [33] with the various American authorities cited to the court, and, in particular, the case of *Ulen & Co.* v. *Polish National Economic Bank*.[34]

It is not to be assumed, however, from what I have said that a corporate body can never be a department of State in any case in which its activities can be described as trading activities.

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[32] 24 N.Y. 2d. 201.

[33] [1949] 2 All E.R. 274.

[34] 24 N.Y. 2d. 201.

In that connexion I would refer to this passage from the judgment of Bankes L.J. in *Compania Mercantil Argentina* v. *United States Shipping Board*,[35] quoted in the *Tass* case.[36] Bankes L.J. said [37]: "The question as to whether the vessel was or was not "employed in private trading really does not arise in a case such "as this where proceedings are taken *in personam*, and it is "established to the satisfaction of the court that the body against "whom the proceedings are taken is a body representing a "Sovereign State." Whatever the position might be in the case of an ordinary trading company or an ordinary bank in which a foreign Sovereign State for reasons seeming good to it acquired shares, it seems to me impossible to hold that a body is disqualified from ranking as a department of State where it is an incorporated body whose operations consist of purchasing and selling or importing and exporting staple commodities in the interests of the public for whom the foreign Sovereign State is responsible. In my view, it cannot be said that the operations of the defendants in this case are comparable to ordinary private trading operations. They are operations for which responsibility has been assumed by the State, and they are being carried out by the defendants under the supervision of the State in the shape of the Spanish Ministry of Agriculture, and I think such purposes as those can properly be classed as public purposes in this connexion. Accordingly, for the reasons I have endeavoured to state, my view on the first question is that the defendants are a department of the Sovereign State of Spain, and none the less so because they have been invested with corporate powers for the purpose of enabling them to carry out their statutory functions under the supervision of the appropriate Ministry. Accordingly, in the view I take, the claim of immunity is made good subject to the question of waiver.

My Lord has formed the opinion that the conclusion which I have reached involves an extension of the doctrine of sovereign immunity. For my part, I cannot agree to that. The doctrine of immunity, after all, comes to no more than this, that the courts of this country will not allow a foreign sovereign to be impleaded directly, or a foreign sovereign's property to be put in jeopardy by a suit in rem. Whether a particular proceeding amounts to an impleading of a foreign sovereign within the meaning of that doctrine seems to me to be a question of fact and probably also a question of local law, in every case. Once the general principle of immunity is recognized, the fact that a particular transaction is held to fall within the rule does not make a decision to that effect an extension of the doctrine merely because occasion for its application to precisely comparable facts has never before arisen. My Lord cited some passages from the *Cristina* case.[38] I would like to add this citation from the speech of Lord Porter in *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*[39]: "One other point on the "question of substance has been mentioned. It was suggested "that immunity would only be granted where the country claim-"ing it, in itself, granted reciprocal immunity to other nations. "I can find no authority for this proposition, and in any case it "was not taken either before Jenkins J. or in the Court of "Appeal, and no material of fact has therefore been presented to "your Lordships to enable them to deal with the argument or to "ascertain whether the two governments concerned grant "reciprocal immunity or not. In my view, the argument in any "case is not established. The question is, what is the law of "nations by which civilized nations in general are bound, not how "two individual nations may treat one another."

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[35] (1924) 93 L.J.K.B. 816; 40 T.L.R. 601.

[36] [1949] 2 All E.R. 274, 276.

[37] 93 L.J.K.B. 816, 817.

Lord Porter went on to refer to Lord Maugham's observations in the *Cristina* case,[40] which suggest a somewhat narrower view. But at all events, this passage from Lord Porter's speech does indicate that in his view the question was: What was the law of nations by which civilized nations in general are bound? If the point is material, I think one must assume, although there is no positive evidence of it, that the particular civilized Sovereign State of Spain considers itself bound by the general principle of sovereign immunity. That, in my view, for the present purpose suffices and it is unnecessary to go further and inquire what view would the courts of Spain take of a claim to sovereign immunity raised by some foreign sovereign in those courts and based on facts comparable to the particular facts of this case.

/ As to the question of waiver, I confess that at first sight, and considering the matter apart from authority, it seemed to me that a formidable case had been made out, having regard to the fact that on instructions by Mr. Cavero, the head of the defendants, Servicio Nacional del Trigo, an unconditional appearance was entered to the writ, and, later, again on his instructions, an application was made for security for costs and an order for

[38] [1938] A.C. 485, 497, 518.

[39] [1952] A.C. 582, 613; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

[40] [1938] A.C. 485, 518.

security was obtained. Mr. Kerr, however, referred us to two cases which (if we accept them as rightly decided, as I think we should), seems to me to conclude the matter the other way. The first of those is *The Jassy*.[41] I think I can give the effect of that case sufficiently by the headnote, which reads [42]: "Process "by way of arrest in a damage action in rem does not lie against "a vessel the property of a foreign sovereign State and destined "to its public use, and, therefore, on the application of the "foreign Government, and the production of a certificate from "the Foreign Office as to the public character of the vessel in "question, all proceedings will be stayed and no waiver of the "privilege assumed, although during the temporary presence of "the vessel in this country, and under a misapprehension, in "order to procure her release, agents of the Government to which "the vessel belonged have given an undertaking to put in bail, and "have entered an absolute appearance."

The President concluded his judgment by saying [43]: "The "result is that the principle laid down in *The Parlement Belge* [44] "applies, in spite of the undertaking to put in bail and appear"ance entered by some agent in Liverpool without the knowledge "of the Roumanian Government and under a misapprehension as "to the privilege enjoyed by a sovereign State in respect of the "immunity of its public vessels from arrest. The action will be "dismissed with costs."

The other authority was a decision of Astbury J. in *In re Republic of Bolivia Exploration Syndicate Ltd.*[45] That was a case under the Diplomatic Privileges Act, 1708, but as was pointed out by Mr. Kerr in argument, the Statute of Anne can be taken as declaratory of the existing law, and the degree of protection afforded to diplomatic personnel under the Act cannot be regarded as superior to the degree of protection afforded to a foreign sovereign. If anything, the protection allowed to the foreign sovereign should be more generous than that accorded to persons of inferior rank. The headnote reads [45]: "This diplomatic "privilege can be waived, if at all, only with full knowledge of "the party's rights, and (semble) with the sanction of his "sovereign or (if he is of inferior rank to a minister plenipoten"tiary) his official superior." Although in that case the person concerned had done acts which undoubtedly would otherwise have amounted to submission to the jurisdiction of the court, it was held that he was not bound, for he had done so in ignorance of his rights. Astbury J. said[46]: " Even if it were conceivable that " a diplomatic agent can waive his privilege, which is really the " privilege of his sovereign, he can only do so intentionally, with " full knowledge of his rights, and with the sanction of his " sovereign or legation."

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[41] [1906] P. 270.
[42] Ibid. 273.
[43] Ibid. 280.
[44] 5 P.D. 197.
[45] [1914] 1 Ch. 139.

Applying those authorities to the present case it seems to me that the evidence here, and in particular the evidence of the ambassador, makes it reasonably plain that Mr. Cavero knew nothing about sovereign immunity, or, at all events, had no idea that by entering an appearance the defendants would be giving up any advantage or, in particular, any right to claim immunity which they might otherwise have. Furthermore, Mr. Cavero's superiors knew nothing about the matter at all until after the acts relied on as submissions to the jurisdiction had taken place. It seems to me, therefore, that what was done here was done by Mr. Cavero without the knowledge of any of his superiors, in ignorance of his rights and without actual authority inasmuch as I think the evidence shows that the authority of the Minister of Agriculture would in fact have been necessary to enable Mr. Cavero to submit to the jurisdiction.

For the reasons I have endeavoured to state, it seems to me that the plaintiffs fail on both branches of the case and, accordingly, that this appeal should be dismissed.

PARKER L.J. I have also come to the conclusion that this appeal should be dismissed, and I can give my reasons briefly.

The first question which arises is whether the body known as Servicio Nacional del Trigo is a department of the State of Spain, namely, a sub-department of the Ministry of Agriculture. If it is, then I think it is clear beyond all doubt that it is entitled to sovereign immunity, and this whatever its activities may be. Whether or not it is such a department is clearly a matter of Spanish law, and His Excellency, the Spanish Ambassador, has sworn that it is.

[His Lordship then read the parts of the ambassador's affidavits to that effect and said:] Although that evidence is, of course, not conclusive, it is entitled to considerable weight; and, as Tucker L.J. said in the *Tass Agency* case[47]: " It is common " ground that the onus of establishing that [the immunity] lies on " [the defendants] . . . Furthermore, it is common ground " that the certificate of their ambassador in this country is not

[46] [1914] 1 Ch. 139, 142.

[47] [1949] 2 All E.R. 274, 281.

C. A.
1956

Baccus S.R.L.
v.
Servicio Nacional del Trigo.

Parker L.J.

"conclusive of the matter, though, no doubt, it is evidence of very "high evidential value, and, in a matter of this kind, I think it "is probably the best kind of evidence that can be procured."

That, as it seems to me, is particularly true in this case when the ambassador here is not only a member of the Spanish Bar, but was also himself Minister of Agriculture from 1941 to 1945.

How, then, do the plaintiffs seek to displace that evidence? Colas, a Spanish lawyer, has sworn two affidavits. In neither of those does he assert that this body is not a department of the State of Spain. He refers to a number of orders setting up this body and describing its functions. Valls, the legal adviser to the Spanish Embassy, has dealt with Colas's affidavits. On a reading of all the affidavits, it seems to me that the evidence all points to this body being a department of the Ministry of Agriculture. But Colas says, and Valls agrees with him, that this body is a legal personality; it is entitled to enter into contracts in its own name, and it is entitled to sue and be sued in its own name. The sole question, then, is: are those admitted facts inconsistent with it being, as prima facie it is, a department of the State of Spain? Unless those facts make it inconsistent with that, the evidence of the ambassador has not been displaced. I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State. It would be surprising if it were so looked upon in this country. Many Ministers are constituted corporations sole. Some, as in the case of the Minister of Transport, for all purposes; some, as in the case of the Minister of Health, for limited purposes; and I do not think anybody could say that under English law the Minister of Transport or the Minister of Health was not the Crown. Indeed, if it were not, neither of those Ministers could ever claim Crown privilege.

It seems to me that Tucker L.J. had this in mind when, in the *Tass Agency* case,[48] which, as my Lords have said, left this point open, he said[49]: "I agree with Cohen, L.J., that, if that "submission had been established, the plaintiff would not necessarily have succeeded in this appeal, and I should desire to "reserve for future consideration the question whether or not "the mere fact of a separate legal existence is necessarily "inconsistent with the entity being part and parcel of a sovereign "independent State. There again, it must depend on the "foreign law. It may be that under some foreign systems of

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[48] [1949] 2 All E.R. 274.

[49] Ibid. 284.

"law such a separate existence might be considered inconsistent, "but it is clear from our Acts of Parliament that we do not "consider the fact that a government department may have a "separate legal juristic existence as necessarily incompatible "with it being a department of State for which immunity can "be claimed."

That being the position under English law, in the absence of evidence to the contrary, I think this court is entitled to assume that the Spanish law is the same. Accordingly, there is no evidence that under Spanish law the fact that this body is a legal personality is inconsistent with its being a department of the State. Nor do I think that a decision to that effect involves an extension of the recognition of sovereign immunity, because on this basis Servicio Nacional del Trigo is a department of the State. It is not a company limited by shares in which the State holds the whole or a controlling interest, and it is not a body which for that or some other reason is wholly distinct from the State. If that were so—and it seems to me that that was the position in the American case[50] to which my Lord has referred—then to grant sovereign immunity to such a body would be a real extension of the principle.

That being so, the only remaining question is that of waiver. Like Jenkins L.J., I confess that at first impression it seemed to me remarkable if the true view was that the State of Spain had not submitted to the jurisdiction. Not only was there an unconditional appearance entered on the instructions of the head of this body, Senor Cavero, himself a senior civil servant, but again on his instructions security for costs was asked for and obtained; and it was not until the writ had been served for some 18 months that any steps were taken to stay the proceedings. I am satisfied, however, as the result of Mr. Kerr's argument and the cases to which he has referred, that there can be no submission in such a case as this unless it is made by a person with knowledge of the right to be waived, with knowledge of the effect of our law of procedure, and with the authority of the foreign sovereign. As Mr. Kerr pointed out, proceedings against a foreign sovereign are wholly void. In *The Parlement Belge*[51] Brett L.J., in giving the judgment of the court,[52] referred to the judgment of Lord Campbell in *De Haber* v. *The Queen of Portugal*,[53] where he relied on the Statute of Anne, the Diplomatic Privileges Act, 1708, with regard to ambassadors, and said[54]: "'Can we doubt that in the opinion of that great judge "'(Lord Holt C.J.) the sovereign himself would have been "'considered entitled to the same protection, immunity, and "'privilege as the minister who represents him.'" And then Brett L.J.[55] says that Lord Campbell "cites the statute thus: "'It has always been said to be merely declaratory of the law "'of nations recognized and enforced by our municipal law, and "'it provides that all process whereby the person of any "'ambassador or of his domestic servants may be arrested, or "'his goods *distrained or seized* shall be utterly null and void.' ". . . The decision [of Lord Campbell] therefore is that the "immunity of the sovereign is at least as great as the immunity "of an ambassador."

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[50] 24 N.Y. 2d. 201.

[51] 5 P.D. 197.

[52] Ibid. 213.

[53] (1851) 17 Q.B. 171.

In those circumstances it does seem to me that it requires some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead; and, without referring to the cases, I think that *The Jassy*[56] and the case before Astbury J., *In re Republic of Bolivia Exploration Syndicate Ltd.*,[57] support that view. So far as this case is concerned, it is true that we have not had the benefit of an affidavit from Senor Cavero, but for my part I cannot impute to him knowledge of the effect of entering an unconditional appearance. Quite apart from that, it seems to me that the evidence is clear that although he is the person, the intermediary, to pass on instructions to English solicitors to deal with a case in England, he is bound to consult the appropriate minister as to whether sovereign immunity should be waived or not. It is true this does open up the rather alarming prospect that a foreign sovereign may allow proceedings to continue for years in this country before taking the point; but for my part I think that that is a theoretical difficulty. I do not think any person, even though he be a foreign sovereign, would be likely to be believed if in such an extreme case he were to come forward and assert that he had had no knowledge whatever of the proceedings. So far, however, as this case is concerned, I am satisfied that the point has been properly taken and that there has been no waiver. For these reasons I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Bell, Brodrick & Gray; Vernor Miles & Clark.*

P. P.

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[54] 5 P.D. 197, 213.

[55] Ibid. 213.

[56] [1906] P. 270.

[57] [1914] 1 Ch. 139.

McCARTHY *v.* LEWIS.

1957
Jan. 15, 23.

Lord Goddard C.J., Cassels and Lynskey JJ.

Mines and Minerals—Coal—Breach of statutory duty—Ventilation—Accumulation of noxious gases due to insufficient ventilation—Mine ventilated by one mechanical fan—Fan stopped for maintenance during week-end—Obligation to provide continuous ventilation—Duty to provide other means of ventilation when fan stopped for repair—Notice posted by manager—Failure by deputy to carry out pre-shift inspection—Liability of manager—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 29 (1), 75, 103 (2).

Section 29 of the Coal Mines Act, 1911,[1] contains no provision allowing ventilating machinery to be stopped for maintenance or repair, and where a mine is ventilated by mechanical means and there is only one fan some duplicate or other means of ventilation must be found to ventilate continuously the workings during such time as repairs are done. If a manager stops the fan and no other ventilation is provided to prevent an accumulation of gas, an offence is committed.

The defendant was acting as manager of a coal mine when on Monday, July 25, 1955, owing to insufficient ventilation, there was an accumulation of noxious gases at the coal face in No. 9's district as a result of which two men, one of whom died, were rendered unconscious. The mine was ventilated by means of one mechanical fan which the defendant had caused to be stopped for maintenance from 1 p.m. on Saturday, July 23, until 7 p.m.

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[1] Coal Mines Act, 1911, s. 2: "(1) Every mine shall be under one "manager, who shall be responsible "for the control, management, and "direction of the mine. . . ."

S. 29: "(1) An adequate amount "of ventilation shall be constantly "produced in every mine to dilute and "render harmless inflammable and "noxious gases to such an extent that "all shafts, roads, levels . . . and "workings of the mine shall be in a "fit state for working and passing "therein. . . ."

S. 75: "Any person who contravenes or does not comply with any "of the provisions of this Part of this "Act shall be guilty of an offence "against this Act, and, in the event "of any contravention of or non-"compliance with any of the pro-"visions of this Part of this Act by "any person whomsoever, the owner, "agent, and manager of the mine "shall each be guilty of an offence "against this Act, unless he proves "that he had taken all reasonable "means by publishing and to the best "of his power enforcing those pro-"visions to prevent that contravention "or non-compliance."

S. 101: "(2) If a mine is not "managed in conformity with this "Act, the owner, agent, and manager "thereof shall each be deemed to be "guilty of an offence against this "Act."

S. 102: "(3) Nothing in this Act "shall render the owner, agent, or "manager of a mine liable to a "penalty in respect of any contraven-"tion of or non-compliance with the "provisions of this Act, if he proves "that the contravention or non-"compliance was due to causes over "which he had no control and against "the happening of which it was "impracticable for him to make "provision."

Note. The Mines and Quarries Act, 1954, which came into force on January 1, 1957, repealed and replaced the Coal Mines Act, 1911.

on Sunday, July 24 (a holiday weekend), a period of 30 hours during which there was no mechanical ventilation in the colliery. The seam at the colliery was not a gaseous seam and there had been no previous trouble from gas. On the morning of Saturday, July 23, the defendant had posted a notice in his pit bottom office, where it could be seen by all the deputies, that the fan would be stopped during the week-end. The deputy in charge of No. 9's district did not on the morning of Monday, July 25, carry out a pre-shift inspection although he knew that it was his duty to do so. The defendant had relied on the deputy to inspect the district before the start of work but had not taken any other steps to ascertain whether or not there was a concentration of noxious gases in the district. An information was preferred against the defendant under section 29 of the Coal Mines Act, 1911, and the justices who accepted the evidence of expert witnesses that the defendant, not having received any report from the deputy as to the presence of gas, was entitled to assume that he had inspected the district and had not found any gas, found as a fact that the defendant had taken all reasonable means to prevent the contravention of or non-compliance with section 29 (1) within the meaning of section 75, and dismissed the information. On appeal by the prosecutor:—

Held, that the duty of providing sufficient ventilation under section 29 (1) was imposed on the manager and as there was an accumulation of gas as a result of insufficient ventilation, due not to an accident but to a deliberate stoppage, the defendant had committed a breach of the provisions of the Act, for which he was primarily and not vicariously liable, for he himself had contravened the Act by failing in the duty imposed on him in respect of continuous ventilation and that, therefore, the second part of section 75 did not apply and afforded no defence.

Atkinson v. *Morgan* [1915] 3 K.B. 23 and *Davies* v. *May* [1937] 2 K.B. 260; 53 T.L.R. 656; [1937] 2 All E.R. 582 followed.

Held, further, that had the defendant sought to excuse himself for the contravention the material defence would be that provided by section 102 (3), but that it would not be right to remit the case to the justices for them to consider whether he could escape liability under that subsection because (1) it would have been for the defendant to set it up at the hearing and he had not done so, and (2) by no possibility could it be said that the contravention was due to causes over which he had no control and against which it was impracticable for him to make provision.

Case stated by Osgoldcross (West Riding of Yorkshire) justices sitting at Castleford.

On January 6, 1956, an information was preferred by a district inspector of mines against the defendant, Myles Lewis, that he, on July 25, 1955, was performing the duties of manager of a certain mine, Ledstone Luck Colliery, at which there was a non-compliance with section 29 (1) of the Coal Mines Act, 1911,[1] in that an adequate amount of ventilation was not constantly produced to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, stables and workings of the mine were in a fit state for working and passing therein, contrary to that section and to sections 75 and 101 of the Act.

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[1] See note 1 on p. 475.

The defendant, under-manager at the Ledstone Luck Colliery, was appointed to perform the duties of manager for the period June 26 to August 6, 1955, during the absence of the manager on an instructional course. The ventilation of the colliery was carried out by means of one mechanical fan which ventilated the whole mine, and the defendant, acting on the instructions of the manager, caused the fan to be stopped for maintenance work for a period of 30 hours from 1 p.m. on Saturday, July 23, until 7 p.m. on the evening of Sunday, July 24 (a holiday week-end), during which time there was no mechanical ventilation in the colliery. At about 6 a.m. on the morning of Monday, July 25, the defendant detailed certain workmen to do back ripping in No. 9's district, a district consisting of a comparatively new coal face which had been worked for only three weeks. Two workmen went from No. 9's Loadergate (about 2,000 yards from the pit bottom) towards the coal face to obtain a tool and were overcome by fumes of noxious gases which, owing to insufficient ventilation, had accumulated there, and as a result of being so overcome one of the men died.

Since to the knowledge of the defendant there had not been a working shift on July 25 before 6 a.m. no preshift inspection had been made of No. 9's district by an outgoing deputy. The deputy in charge of No. 9's district, one Gregory Needham, a duly appointed deputy in the colliery to whom the defendant had assigned the district, knew this but he did not make a preshift inspection before the commencement of work by the men, although he knew that it was his duty to make the inspection, and he admitted that he had failed to do so.[2] The defendant had posted a notice in his pit-bottom office where it could be seen by the deputies employed at the colliery containing the paragraph "Fan will be stopped during week-end for repair," but apart from that notice Needham had not been told by the defendant that the fan would be or had been stopped during the week-end. The defendant relied upon Needham to inspect

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[2] Before the hearing of the information against the defendant the justices convicted Needham on a charge under s. 64 of the Coal Mines Act, 1911.

No. 9's district before the commencement of work therein, but he did not take any other steps to ascertain whether or not there was any concentration of noxious gases in No. 9's district. All previous stoppages of the fan had been before the opening of No. 9's district, and at no time had it been stopped for as long as 30 hours.

The facts found by the justices are more fully detailed in the judgment of the court.

It was contended for the inspector of mines that by virtue of section 3 (2) and section 75 of the Coal Mines Act, 1911, the defendant, being the person performing the duties of the manager for the time being, was guilty of the offence charged.

It was contended for the defendant (a) that the breach of section 29 (1) of the Act was due to the accumulation of gas which previous experience of the seam had given no cause to expect or foresee, and the failure of the existing ventilation to clear that gas during the 11 hours preceding 6 a.m. on July 25; and (b) that, since the accumulation of gas was at a point more than one mile inbye from the pit bottom, there were no practical steps which he could have taken to prevent the breach other than the steps which he in fact took, namely, (1) the restoration of the existing ventilation at 7 p.m. on July 24; (2) the posting of the notice in the office that the fan had been stopped for the week-end; and (3) the assignment of the deputy Needham to No. 9's district and reliance on him to make a preshift inspection and report on the condition, inter alia, of the ventilation and presence of gas.

The justices found as a fact that the defendant had taken all reasonable means to prevent the contravention of or non-compliance with section 29 (1) within the meaning of section 75 of the Act, and, being of opinion that the contentions for the defendant were correct, dismissed the information.

The inspector appealed.

Edmund Davies Q.C. and *Rodger Winn* for the appellant inspector. The justices were wrong in dismissing the information on the ground that the defendant had taken all reasonable steps within the meaning of section 75 to prevent the contravention of or non-compliance with section 29. Section 75 is concerned with two separate matters, first, the responsibility of any person in the mine for any contravention of or non-compliance with the Act committed by him personally, and, secondly, the vicarious responsibility of the owner, agent or manager for contravention of or non-compliance with the Act by other persons. It is in respect of the second class, of vicarious and not personal, liability that the section provides a defence on proof that all reasonable steps were taken to prevent the contravention or non-compliance: *Davies* v. *May*.[3] Section 29 imposes the duty of providing an adequate amount of ventilation upon the manager personally: *Atkinson* v. *Morgan*,[4] and, therefore, the defence provided in the second part of section 75 does not apply in the case of contravention of or non-compliance with section 29.

In any event, on the facts, it cannot be said that the defendant took all reasonable steps to prevent the accumulation of gas.

Geoffrey Veale Q.C. and *R. Withers Payne* for the defendant. Section 75 is concerned with breaches of the Act by a specific employee for which it makes the owner, agent or manager vicariously liable. Contravention of section 29 is a managerial, not a personal, offence, that is, it is a contravention for which no specific person can be pointed to as being responsible; in such a case section 101 (2) makes the management responsible, and if a manager is to be made liable for a breach of section 29, that section must be prayed in aid. The proceedings against the defendant under both section 75 and section 101 made the information bad for duplicity and, since the prosecution elected to proceed under section 75, if that section does apply, it is the second part of it which is applicable and the defendant is entitled to rely upon the defence therein provided.

If section 75 does not apply the defendant is protected by section 102 (3). The justices found that he had taken all reasonable steps to prevent the contravention of or non-compliance with section 29, and there was nothing more that he could do. It is not suggested that 11 hours after the starting of the fan was not a proper length of time before commencing work, and a manager cannot himself go all over the mine; he cannot do other than rely on properly appointed deputies.

Edmund Davies Q.C. in reply. The defence that all reasonable steps were taken applies to a different type of liability from that of the defendant in this case. It is not a question of liability for an offence committed by some other person, because there is no person other than the manager upon whom the duty under section 29 is laid, and no one apart from the manager who can be fixed with responsibility for a breach of the section. The defendant, therefore, is liable under the first part of section 75, and section 102 (3) does not apply. The justices found that the only steps taken by the defendant were to start the fan, put up a notice and instruct the deputy; that is insufficient to bring him within the wording of section 102 (3).

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[3] [1937] 2 K.B. 260; 53 T.L.R. 656; [1937] 2 All E.R. 582.

[4] [1915] 3 K.B. 23.

Cur. adv. vult.

January 23. Lord Goddard C.J. read the following judgment of the court. This is a case stated by justices for the West Riding of Yorkshire before whom an information was preferred by the appellant against the defendant for that he on July 25, 1955, was performing the duties of manager of the Ledstone Luck Colliery at which there was a non-compliance with section 29 (1) of the Coal Mines Act, 1911, in that an adequate amount of ventilation was not constantly produced to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, etc., of the mine were in a fit state for working and passing therein contrary to that section and to sections 75 and 101 of the Act. A second information was also preferred against the defendant for another alleged offence under the Act and both informations were dismissed by the justices. The appellant has not sought to challenge their decision so far as the second information is concerned, and we will, therefore, only state the facts which relate to the first.

The defendant was appointed under-manager of the colliery on April 1, 1952, and owing to the absence of the manager on an instructional course from June 26 to August 6, 1955, he was appointed to perform the duties of the manager for that period in accordance with section 3 of the Act. The ventilation of the colliery was carried out by means of one mechanical fan designed to ventilate the whole mine. From time to time this mechanical fan was stopped for the purpose of servicing it. Before going on leave the manager of the colliery had instructed the defendant that the fan should be stopped for maintenance work during the first week-end of the annual holiday period, and accordingly the defendant gave instructions for it to be stopped at 1 p.m. on July 23. It was restarted at 7 p.m. on the evening of Sunday, July 24, and during the period of stoppage there was no mechanical ventilation in the colliery. An accumulation of noxious gases took place at the coal face of No. 9's district, and this accumulation was still present when the colliery restarted work on the morning of July 25 and, in fact, was not dispersed for some three days thereafter. It seems that previously there had been no trouble from gas in the colliery, but on July 25 the justices find that the amount of ventilation in No. 9's district was not adequate to dilute and render harmless the noxious gases in the district so that it was not at the material time in a fit state for working or passing therein. On the morning of July 25 the defendant went down the mine together with two deputies, one of whom was named Needham, and certain workmen. At the office at the pit bottom the defendant detailed two sets of three workmen each under two charge hands to do back ripping in that district and Needham was the deputy in charge of those six men. The six men proceeded to walk to a point known as No. 9's Loadergate and it was the duty of the six men not to pass beyond this meeting station until it had been examined by the deputy. The deputy had stayed behind at the pit bottom for a short time and then followed the men and found them at the Loadergate where stripping off ready for work had begun and it was found that some necessary tools were not available. Two of the workmen went along the conveyor towards the coal face to obtain a tool which was thought to be there. They were overcome by noxious gas and when they were brought out one of them died as a result of the gas but the other subsequently recovered. The justices also found that on no previous occasion had the fan been stopped for as long as 30 hours, and that the stoppage was not due to an accident but was a deliberate stoppage so that maintenance work could be carried out on the fan.

On the morning of Saturday, July 23, the defendant posted a notice in his pit bottom office where it could be seen by the various deputies though not by the workmen. The notice stated that the fan would be stopped during week-end for repair. The justices also find that the defendant had assigned Needham as deputy for this district and relied upon him to fulfil his statutory duties under sections 14 and 64 of the Act, and in particular to inspect No. 9's district before the commencement of work therein. The defendant did not take any other step to find out if there was any concentration of noxious gases in the district. Needham did not make an inspection as he ought to have done. The justices accepted the evidence of the manager of the colliery that had he been on duty he would have relied upon the deputy's inspection, and they also accepted the evidence of the area production manager of the National Coal Board that the defendant's conduct in relying upon the deputy's preshift inspection for gas after the stoppage of the fan would meet with his approval. We understand by these findings that the two witnesses in question considered that as the defendant had not received any report from the deputy as to the presence of gas he was entitled to assume that the deputy had inspected the district and had not found any gas. The justices then found that the defendant had taken all reasonable means to prevent the contravention of or non-compliance with sections 29 (1) and 64 of the Act within the meaning of section 75 of the Act and accordingly dismissed the informations.

Section 2 of the Act provides that every mine shall be under one manager who shall be responsible for the control, management and direction of the mine, and the owner or agent of every mine shall appoint himself or someone else to be the manager of such mine. Section 3 provides that in the absence of the manager the duties must be performed by the under-manager if he is properly qualified, and there was no question but that the defendant was so qualified. Section 29, the first section of Part II of the Act, which contains provisions as to safety, provides that an adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, and other places shall be in a fit state for working and passing therein, and in particular that the intake airways up to within 100 yards of the first working-place at the working-face which the air enters shall be normally kept free from inflammable gas. The section then provides that an abandoned road or level not used in connexion with the working of the mine shall, if properly fenced off, not be deemed to be a road or level within the meaning of the section, and that no person shall be liable in respect of any contravention of or failure to comply with the provisions of the section if he shows that the ventilation was interrupted in consequence of an accident. There is no provision allowing ventilation machinery to be stopped for maintenance or repair unless caused by an accident, and it would seem, therefore, that there must be duplicate or other means of ventilating the shaft if the ventilation was provided by mechanical means, as must generally be the case, during such time as any repairs are being done. Although section 29 does not state in terms upon whom the duty of seeing to the adequate ventilation is imposed, it was decided in *Atkinson* v. *Morgan*[1] that the duty of providing sufficient ventilation is imposed on the manager, and if it proves to be insufficient it is no defence for the manager to say that he has appointed some other competent person to attend to it. As there was in this case an accumulation of gas due to insufficient ventilation, it would appear clear that the defendant did commit a breach of the provisions of the Act.

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[1] [1915] 3 K.B. 23.

We now turn to section 75, which provides that any person who contravenes or does not comply with any of the provisions of this Part of the Act shall be guilty of an offence against the Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of the Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance. The result of *Davies* v. *May*[2] is to confirm the opinion which had been tentatively expressed by Avory J. in *Atkinson* v. *Morgan*[3] that that part of section 75 which begins with the words "and, "in the event of any contravention" is dealing with offences for which the owner, agent or manager may be vicariously liable, while the first sentence deals with the primary liability of a person who contravenes any of the provisions of the Act. It follows that as the duty of seeing that there was adequate ventilation constantly produced lay on the defendant he was primarily and not vicariously liable for the failure. In our opinion, therefore, the second part of the section has no application. This is not a case where the defendant is vicariously liable for somebody else's failure. He himself has contravened the Act by failing in the duty which was imposed upon him in respect of the continuous ventilation of the mine.

It is now necessary to consider sections 101 and 102 of the Act. Section 101 is a penalty section; subsection (1) provides that every person employed in or about a mine, other than an owner, agent or manager, who is guilty of any act or omission which in the case of an owner, agent or manager would be an offence against the Act, shall be deemed to be guilty of an offence against the Act. Subsection (2) provides that if a mine is not managed in conformity with the Act, the owner, agent and manager thereof shall each be deemed to be guilty of an offence against the Act. The effect of these two subsections would seem to be that if the manager is guilty of an offence against the Act so also the owner or agent is guilty, and the next subsection provides for the penalty that may be imposed for the offences. Section 102 (3), however, provides that nothing in the Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of the Act if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision. In our opinion, if the defendant had sought to excuse himself for the contravention it was this subsection and not section 75 that would be material for this purpose; but the subsection does not seem to have been considered by the justices, nor is there any indication that the defendant relied upon it, and it would be for him to set it up if he wished to take advantage of it. We do not, however, consider that it would be right to remit the case to the justices for them to consider whether the defendant could escape liability under this subsection, first, because it would have been for him to set it up at the hearing and he did not, and, secondly, because it is quite clear that on the facts found by the justices by no possibility could it be said that the contravention was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

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[2] [1937] 2 K.B. 260; 53 T.L.R. 656; [1937] 2 All E.R. 582.

[3] [1915] 3 K.B. 23, 30.

We have already pointed out that section 29 requires the ventilation to be continuous except in the cases which are dealt with by the proviso. It is quite clear here there was no continuous ventilation. The road on which the accumulation of gas occurred was not a disused road nor was it due to an accident. It was due to the deliberate stoppage of the ventilation. It seems clear that if there is only one fan, some means must be found to ventilate continuously the workings, and if the manager stops the fan and there is no other ventilation so as to prevent an accumulation of gas an offence has been committed.

We have already pointed out that section 75 affords no defence to the defendant for a contravention for which he was directly and not vicariously liable, and accordingly the case must go back to the justices with an intimation that an offence was committed and there must be a conviction.

Appeal allowed.

Solicitors: *Treasury Solicitor; C. M. H. Glover, Divisional Legal Adviser, National Coal Board, Doncaster.*

J. F. L.

HARVEY *v.* CRAWLEY DEVELOPMENT CORPORATION.

C. A.

1957
Jan. 23, 24.

Denning, Romer and Sellers L.JJ.

Compulsory Purchase — Compensation — Compensation for "disturbance" — House compulsorily purchased — Purchase price agreed between owner-occupier and acquiring authority—Expenses incurred by owner in purchasing new home—Whether expenses recoverable as compensation for disturbance—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *rules* (1), (2), (5), (6).

A householder whose home had been compulsorily purchased by a new town development corporation at an agreed price of £4,148, which included the legal costs of that purchase and expenses incurred in moving her furniture and having curtains and carpets adjusted to fit a new house, claimed in addition as "compensation for disturbance" under rule (6) of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, the surveyors' fees, legal costs and travelling expenses totalling £241 incurred by her, first, in an abortive proposed purchase of a new home and, secondly, in the purchase of a new home:—

Held, (1) that the costs claimed were not part of the agreed purchase price.

Beard v. *Porter* [1948] 1 K.B. 321; 63 T.L.R. 543; [1947] 2 All E.R. 407 applied.

(2) That the householder was entitled to the costs claimed; for under the rules in section 2 and on the authorities any loss sustained by a dispossessed owner-occupier of a house which flowed from the compulsory acquisition could properly be the subject of compensation for disturbance, provided (a) that it was not too remote and (b) that it was the natural, direct and reasonable consequence of the dispossession. Nothing in rule (5) of section 2 (which deals with compensation for reinstatement) excluded from "compensation for disturbance" an item which included an element of reinstatement, for rule (5) was directed only to the assessment of compensation for land which had no general market value. The question whether any particular item of expenditure came within "compensation for disturbance" was in each case a question of fact for the tribunal.

Horn v. *Sunderland Corporation* [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480; *Venables* v. *Department of Agriculture for Scotland*, 1932 S.C. 573; and *Metropolitan and Metropolitan District Railway Companies* v. *Burrow* (Cripps on Compensation (8th ed., p. 906)) followed.

Per Denning L.J. The owner only recovers costs of this kind in a case where a house compulsorily acquired was occupied by him and he is forced out of it and reasonably finds a house elsewhere in which to live. Compensation for disturbance of this nature would not be payable where the house was owned as a form of investment or where no new home was purchased.

C. A.
1957

HARVEY
v.
CRAWLEY
DEVELOPMENT CORPORATION.

APPEAL ON CASE STATED by the Lands Tribunal.

The facts as stated in the case were as follows. By an agreement dated December 31, 1953, the claimant, Mrs. E. M. Harvey, agreed with the Crawley Development Corporation to sell her property, " St. Raphaels," Three Bridges Road, Crawley, Sussex, with vacant possession, " at a price to be agreed or failing agree-" ment to be settled by the Lands Tribunal set up by the Lands " Tribunal Act, 1949, as though an order had been made and " confirmed in accordance with the provisions of Part I of the " Second Schedule to the Town and Country Planning Act, 1944, " and section 4 of the New Towns Act, 1946, and as though a " notice to treat had been served on the day of the date hereof." It was further agreed that the rules for assessment set out in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919,[1] should incorporate the conditions thereto provided in Part V of the Town and Country Planning Act, 1947.

A claim was made by the claimant and certain items were agreed between the parties. These were: The value of the land with vacant possession under rule (2) of section 2 of the Act of 1919; surveyors' fees and legal costs in connexion with the sale of the land; expenses of removal to other premises; and the cost of alterations to curtains, etc., in order to fit them for use in the new premises. In respect of all those items a sum of £4,148 1s. was agreed. There were, however, certain other items of claim which were in dispute between the parties, namely: (1) legal costs and stamp duty payable on purchase of the new house—£157 19s.; (2) surveyors' fees in connexion with the purchase of the new house—£23 7s. 6d.; (3) travelling expenses incurred by the claimant in connexion with the acquisition of the new house —£4.

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[1] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2: " In assessing compensation, an " official arbitrator shall act in accord-" ance with the following rules:— " (1) No allowance shall be made on " account of the acquisition being " compulsory: (2) The value of land " shall, subject as hereinafter pro-" vided, be taken to be the amount " which the land if sold in the open " market by a willing seller might " be expected to realize: . . . (5) " Where land is, and but for the com-" pulsory acquisition would continue " to be, devoted to a purpose of such " a nature that there is no general " demand or market for land for that " purpose, the compensation may, if " the official arbitrator is satisfied " that reinstatement in some other " place is bona fide intended, be " assessed on the basis of the reason-" able cost of equivalent reinstate-" ment: (6) The provisions of Rule " (2) shall not affect the assessment " of compensation for disturbance or " any other matter not directly based " on the value of land. . . ."

In the course of her search for alternative accommodation the claimant was also involved in expense in connexion with a proposed purchase of premises which subsequently proved abortive. She found a house which provided her with suitable alternative accommodation and entered into a contract to purchase, subject to surveyors' report. The surveyors' report proved unsatisfactory, and the claimant was therefore released from her contract. In connexion with that abortive purchase further expenses, for surveyors' costs and expenses, legal costs and travelling expenses totalling £56 odd, were incurred by the claimant and also formed part of her claim, in respect of which the acquiring authority disclaimed liability. There was no dispute between the parties as to the amount of any of those various items, and the dispute being solely one as to legal liability, the matter was heard as a preliminary hearing on a point of law under rule 37 of the Lands Tribunal Rules, consequent on an order made by the President on June 15, 1956.

It was contended on behalf of the claimant that each and all of those items were expenses which she would never have had to incur but for the acquisition of her residence, and that they were proper subjects for compensation under rule (6) of section 2 of the Act of 1919.

It was contended on behalf of the acquiring authority that all the items of claim must be deemed to be included in the amount assessed under rule (2) of section 2, since a willing seller necessarily involved the idea of vacant possession, and the price which a willing seller would require for premises with vacant possession would necessarily allow for all expenses and costs which might be reasonably expected to be incurred in obtaining alternative accommodation, and that therefore those items, having been included in the value with vacant possession, could not form the subject of additional claim; that the items really amounted to a claim for reinstatement; and that as the present case was not one to which rule (5) applied, compensation for reinstatement was not applicable.

The Lands Tribunal held that the value arrived at under rule (2) did not include any of the items in dispute and that each of the first three items resulted directly from the compulsory acquisition which was to be assumed in this case. In the light of the majority decision in *Beard* v. *Porter*[2] they concluded that legal costs, stamp duty and surveyors' fees incurred in the purchase of a property were not represented in its market value, and consequently that the market value arrived at under rule (2) could not be assumed to include expenses of this character which would have to be incurred in acquiring a similar property. Nor was it in the opinion of the tribunal a question of reinstatement, but of reimbursement of a "personal loss imposed on the owner "by the forced sale": *per* Scott L.J. in *Horn* v. *Sunderland Corporation.*[3] Accordingly, the tribunal was satisfied that the first three items, being reasonable expenses which would never have been incurred by the claimant but for the compulsory acquisition, were items which she was entitled to recover under rule (6). As to the items resulting from the abortive purchase, the tribunal took the view that that claim was more doubtful, since such expenses, unlike those incurred in connexion with the purchase of a new house, would not necessarily follow from a compulsory acquisition; but it was clear that they would not have been incurred by the claimant but for the acquisition of her property, and since it was admitted by the acquiring authority that she had acted reasonably in incurring them, they might be said to have been necessitated by the compulsory acquisition and should therefore be regarded as proper subjects for compensation under rule (6).

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[2] [1948] 1 K.B. 321; 63 T.L.R. 543; [1947] 2 All E.R. 407.

They therefore awarded against the acquiring authority, in addition to the agreed sum of £4,148, the sum of £241 10s., representing the amount of the six items in dispute.

The acquiring authority, the Development Corporation, appealed.

G. D. Squibb Q.C. and *Leslie Scarman* for the corporation. The costs here claimed are not compensation for disturbance under rule (6) of section 2 of the Act of 1919, but are claims for the cost of reinstatement to which the claimant would be entitled only if the case fell within the limits of rule (5); compensation under rule (5) operates to the exclusion of claims based on the "market price" of the land under rule (2). In agreeing to the purchase price this claimant must be taken to have considered the costs she would incur in purchasing a new home, and therefore they must be assumed to be included in the agreed purchase price. *Beard* v. *Porter*[4] is distinguishable, for though it was there said that stamp duty and legal costs were not part of the agreed purchase price, that case was a claim for damages for breach of contract, and the court rightly held that the vendor who broke the contract must put the disappointed purchaser in the same position as he would have been in if the contract had been fulfilled; but a compulsory acquisition under the statutory rules is on a quite different basis; it is no concern of the acquiring authority what the seller does with the money he obtains on a compulsory sale. He is not now entitled to any compensation for the compulsory element; that is excluded by rule (1), though under the original Lands Clauses Consolidation Act, 1845, the vendor used to get a percentage, normally 10 per cent., of the value of the land as a sort of compensation for the compulsory element. Under that Act the practice which grew up was to give the owner of land compulsorily acquired the value of the land to him plus the percentage mentioned above, and also an amount for "disturbance": see *per* Lord Halsbury L.C. in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.*[5] The decision under the Act of 1845 of *Metropolitan and Metropolitan District Railway Companies* v. *Burrow* [6] indicated that compensation for reinstatement applied only to business premises; now it applies only to cases under rule (5). [*Jubb* v. *Hull Dock Co.*[7] and *Rickets* v. *Metropolitan Railway Co.*[8] were also referred to.] The dictum of Scott L.J. in *Horn* v. *Sunderland Corporation* [9] that compensation for disturbance included cost of reinstatement was obiter and should not be applied, particularly as the amount of compensation for disturbance was not there in dispute, and the dictum is contrary to rule (5). All that this claimant is entitled to is the cost of moving out to give vacant possession to the acquiring authority. It would put an impossible burden on acquiring authorities if costs such as these were to be allowed under "disturbance."

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[3] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[4] [1948] 1 K.B. 321, 326.

Michael Rowe Q.C. and *J. C. Leonard* for the claimant. Three questions arise: (1) Are the expenses claimed included or deemed to be included in the market value under rule (2), that is, the price agreed? (2) If not, are they a loss to the expropriated owner resulting directly from the acquisition? If they are, then prima facie they are items of disturbance and so fit subjects for compensation under rule (6). (3) Even if they are a direct result of the acquisition, should they nevertheless be disregarded because they are part of the cost of reinstatement and to that extent to be excluded unless the case comes under rule (5)?

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[5] (1887) 12 App.Cas. 315, 320.

[6] Reported in Cripps on Compensation (8th ed., 906); (1884) The Times, Nov. 22.

[7] (1846) 9 Q.B. 443.

[8] (1865) 34 L.J.Q.B. 257.

[9] [1941] 2 K.B. 26, 49.

On the first question, the dictum of Tucker L.J. in *Beard* v. *Porter*[10] is conclusive authority, namely, that "stamp duty and "legal costs" are not part of the purchase price or "market "value" under rule (2). Rule (2) did no more than limit the rule of practice under the Act of 1845 which based compensation on the value of the land to the owner. Nothing in the Act of 1919 indicates that the expenses of the kind here claimed are deemed to be part of the market value, and therefore they cannot be "assumed" to be so.

On the second question, it has not been contended that these expenses are too remote; indeed, the case states that they are the direct result of the acquisition. A man displaced from his home has to find somewhere to live; it is a direct result of the expropriation. Prima facie all loss of that nature is within "disturbance" as judicially interpreted and defined in rule (6), though the circumstances of a particular case may make it too remote. The Act of 1919 did not alter the pre-Act position on "disturbance": see *per* Greene M.R. and Scott L.J. in *Horn* v. *Sunderland Corporation*[11] and *Burrow's* case.[12] In the latter case the reinstatement claimed was physical and not merely business reinstatement. *Venables* v. *Department of Agriculture for Scotland*[13] shows the correct approach to a claim for disturbance.

On the third question, rule (5) does not exclude all replacement or reinstatement. "Value of the land to the owner"—the basis of compensation before 1919—was replaced in that Act by "market value" under rule (2); so something had to be done about the value of land for which there was no market value and to which rule (2) was not applicable, e.g., a church; and such cases were provided for by rule (5), which provides that the value can be determined by reference to the cost of reinstatement. But rule (5) does not say that "reinstatement" is exclusive of "disturbance." Reinstatement forms part of claims almost every day, e.g., new notepaper for a business which has had to move.

Compensation under rule (6) is not limited to the costs of moving out. The costs in question were the natural result of the action of the acquiring authority. The tribunal found them to be reasonable, and so within the contemplation of the acquiring authority. The precise measure of loss will vary from case to case and will be a question of fact for the tribunal, depending on the opportunity the dispossessed owner may have of getting alternative accommodation. Though the costs of the abortive purchase in this case might have failed for remoteness, the authority elected to say that they were reasonable, and accordingly they should be allowed.

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[10] [1948] 1 K.B. 321, 326.

[11] [1941] 2 K.B. 26, 34, 41.

[12] Cripps on Compensation (8th ed., 906).

[13] 1932 S.C. 573.

Squibb Q.C. replied.

DENNING L.J. Mrs. Harvey used to own a house, "St. "Raphaels," Three Bridges Road, Crawley, Sussex. The Crawley Development Corporation decided to acquire that house compulsorily. When Mrs. Harvey was faced with the request for acquisition, she agreed to let the Crawley Development Corporation have the house at a price to be settled by the Lands Tribunal in accordance with the statutory provisions. The question before us is as to the way in which the compensation should be assessed. The Crawley Development Corporation agree that she is entitled to the value of the house with vacant possession in the open market; also the surveyors' fees and the legal costs which she incurred in disposing of her house to the Crawley Development Corporation. She has also been allowed the expenses of removing her furniture to other premises, and the cost of alterations to her curtains and carpets, and so on, in order to fit them for use in her new house. The agreed total sum which she has been awarded for those items comes to £4,148 1s. There is no question about them. But the question in the case arises in this way. Mrs. Harvey tried to find another house for herself to go into. She saw a house which she liked and was proposing to buy it, but she had a surveyors' report for it and when she got the surveyors' report she discovered it was an unsatisfactory house and she did not go on with the purchase of it. Afterwards she did find a house which suited her and she bought it. She had to pay the solicitors' costs and the surveyors' fees when she bought it; she had some travelling expenses, and so on. The total expense to which she was put for surveyors' fees and legal costs (on the proposed house and the house she bought) comes altogether to £241 10s. 1d.; and the question is whether she is entitled by way of compensation to have that sum in addition to the £4,148 1s. It has been found by the Lands Tribunal that those expenses were all reasonably incurred by her in finding another house, and the tribunal has awarded that sum to her as compensation. The Crawley Development Corporation appeal to this court and say that in point of law such compensation is not to be granted to Mrs. Harvey.

The principles of compensation have been gradually developed over the years in cases decided on the Lands Clauses Consolidation Act, 1845, but specific rules are now stated in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Under those Acts the law is settled, both in this country and in Scotland, by two cases. The Scottish case is *Venables* v. *Department of Agriculture for Scotland*,[1] and the English case is *Horn* v. *Sunderland Corporation*,[2] in this court. Those cases show that, in addition to the actual market value of the house, when sold with vacant possession, Mrs. Harvey is entitled to "compensation for disturbance," which is specifically preserved by section 2, rule (6), of the Act of 1919, and includes all damage directly consequent on the taking of the house under statutory powers. The question is whether these costs of £241 10s. 1d. come within that head.

I would like to say at the outset that the sum of £4,148 1s. which Mrs. Harvey has already received does not include anything in respect of these costs of £241 10s. 1d. to which she has been put in getting another house. If you sell your house for £4,000, you can put the £4,000 into the bank and keep it. If you buy another house for £4,000, you can take the money out of the bank to pay for it, and you have your value of £4,000 in the shape of the new house. But you have to find the costs from some other pocket. They are extra costs not included in the £4,000. A good illustration is the decision of this court in *Beard* v. *Porter*.[3] It seems to me that, as these costs of £241 10s. 1d. were reasonably incurred by Mrs. Harvey in getting another house, they can fairly be regarded as a direct consequence of the compulsory acquisition. Prima facie, therefore, they fall within the heading of compensation for disturbance. But it is said that they are not properly compensation for disturbance, but only compensation for reinstatement: and that the cost of reinstatement of a person in other premises can never be the subject of compensation; and rule (5) of section 2 was relied on. I do not think that rule (5) supports that proposition. It is only dealing with the value of land when there is no market for it. Take, for instance, a church, for which there is no market. Under rule (5) you can sometimes get the cost of buying another piece of land and putting up a church on it. The fact that the cost of reinstatement is there specifically allowed does not mean that in every other case anything in the nature of reinstatement is to be disallowed. It all depends on whether it comes properly within "compensation for disturbance."

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[1] 1932 S.C. 573.

[2] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[3] [1948] 1 K.B. 321; 63 T.L.R. 543; [1947] 2 All E.R. 407.

Next it was said that Mrs. Harvey was really seeking compensation for the acquisition being compulsory, and rule (1) was referred to, which states that no allowance shall be made on account of the acquisition being compulsory. Rule (1) is, however, only directed to the added sop (which was in the old days always given in these cases) of 10 per cent. to soften the blow of compulsory acquisition. Rule (1) disallows that 10 per cent. It leaves untouched the rule that everything which is a direct consequence of the compulsory acquisition can be recovered under the head of "compensation for disturbance." Instances were given in this very case. Mrs. Harvey gets compensation for having to move out her furniture and put it into the new house: she gets compensation for having to alter the curtains and carpets and remake them to fit the new windows and floors. Take business premises where fixtures and fittings have to be moved; or where there is loss of business through being turned out; or loss of goodwill. All that loss and expense is the proper subject of "compensation for disturbance" in addition to the open market value of the land.

I would therefore say that this money which has been expended, this £200 odd, which is the direct consequence of Mrs. Harvey being turned out of her house, is properly to be regarded as compensation for disturbance. But I would not like this to be taken too far. Cases were put in the course of the argument. Supposing a man did not occupy a house himself but simply owned it as an investment. His compensation would be the value of the house. If he chose to put the money into stocks and shares, he could not claim the brokerage as compensation. That would be much too remote. It would not be the consequence of the compulsory acquisition but the result of his own choice in putting the money into stocks and shares instead of putting it on deposit at the bank. If he chose to buy another house as an investment, he would not get the solicitors' costs on the purchase. Those costs would be the result of his own choice of investment and not the result of the compulsory acquisition. Another case was put in the course of the argument. If an elderly man and wife owned and occupied a house which was compulsorily acquired and they thought to themselves: "We do "not think we need to get another house; we will go into a guest-"house," they would not get the costs of moving into a new house when they had not incurred them. Nor would they be able to claim the cost of living in a boarding-house for the rest of their days. They would only get the market value of their former home. These illustrations show that the owner only recovers costs of the present kind in a case where a house is occupied by an owner living there who is forced out and reasonably finds a house elsewhere in which to live. If he pays a higher price for the new house, he would not get compensation on that account, because he would be presumed to have got value for his money: but he does get the costs which he has to pay a surveyor and lawyer to get it. It seems to me that the costs are then the subject of compensation under the heading of "disturbance" as specified in rule (6) of section 2.

For these reasons, I think that the decision of the Lands Tribunal was correct, and I would dismiss the appeal.

ROMER L.J. I agree. It seems to me that the authorities to which our attention was drawn do establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided, first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner. That proposition, I think, emerges from *Venables* v. *Department of Agriculture for Scotland*,[4] from *Horn* v. *Sunderland Corporation* [5] (especially, perhaps, from the judgment of Scott L.J.) and also from *Metropolitan and Metropolitan District Railway Companies* v. *Burrow* [6]; and I would especially draw attention to the judgment of Bowen L.J.[7] in the latter case when the matter came before the Court of Appeal.

Applying that principle, no question of remoteness was raised in relation to the items now in dispute, although perhaps it might have been raised with regard to the expenditure which was incurred by Mrs. Harvey in connexion with the abortive purchase of a house which she was advised by her surveyor was not a suitable residence for her; and certainly no question of remoteness could arise with regard to the actual purchase which she did make. Nor is there any question, as I think, but that the items of expenditure were naturally and reasonably incurred by Mrs. Harvey. The natural thing for a dispossessed owner-occupier to do is to buy another home of a comparable kind, and that in fact is what Mrs. Harvey did. Indeed, it appears from the case itself that it was not suggested by the acquiring corporation that it was an unreasonable action on Mrs. Harvey's part. The fact that in some sense reinstatement or replacement may be involved does not appear to me to disqualify the claim under rule (6) of section 2 of the Act of 1919; and I entirely accept for my part the argument which Mr. Rowe addressed to us on that aspect of the case.

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[4] 1932 S.C. 573.

[5] [1941] 2 K.B. 26, 40.

[6] Reported in Cripps on Compensation (8th ed., p. 906).

[7] Ibid. 914.

I would only add that the tribunal's decision in this case seems to me not only to be right in law but to accord with common sense. I cannot help feeling that the contrary view would lead to a great deal of discontent on compulsory acquisitions. It is bad enough in itself for a person to be compulsorily dispossessed of his home, but it is worse still if he has himself to bear expenses of the kind which are in issue in the present case in finding another house in which to live. I agree that the appeal should be dismissed.

SELLERS L.J. I agree. Before the tribunal the present claim appears to have been resisted on the ground that the expenditure was already reflected in the vacant possession value of the property, and, if that were right, that would amount to compensation for this particular expenditure having already been assessed. But the tribunal applied (and in my view rightly applied) the majority decision in *Beard* v. *Porter*,[8] where Tucker L.J. said that the buyer must be presumed to have received full value for the money which he paid on his purchase and that the stamp duty and legal costs were not part of the purchase price. Therefore, this expenditure, which was undoubtedly made by Mrs. Harvey, has not been accounted for there. The argument before this court, as I understood it, was that it was not recoverable because it was in its nature a payment in respect of reinstatement or replacement of herself and her furniture in other premises. In support of the contention that that was not recoverable reliance was placed on section 2, rule (5), of the Acquisition of Land (Assessment of Compensation) Act, 1919; but, for the reasons given by my Lords in dealing with the interpretation of that rule, I agree that that does not preclude a claim for disturbance which may include an element of reinstatement. Rule (5) is only a provision directed to the assessment of the appropriate compensation where there is no general demand or market for the land which has to be assessed.

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[8] [1948] 1 K.B. 321, 326.

C. A.
1957
HARVEY v. CRAWLEY DEVELOPMENT CORPORATION.
Sellers L.J.

Romer L.J. has stated the principles to be derived from the cases cited to us, and on those principles (which I entirely accept and would adopt) it becomes in any given case a question of fact for the tribunal whether any particular item of expenditure does come within their terms. The evidence in this case would seem to show that the tribunal were entirely justified in saying that this particular expenditure in relation to the acquirement of new premises—it may be that the abortive expenditure was a misfortune, but no distinction is made between the two—is expenditure which was directly arising from the circumstance that this lady had to find another house in which to live by reason of being compulsorily dispossessed of her home. In my view the tribunal came to a correct decision.

Appeal dismissed.
Leave to appeal to the House of Lords granted on terms.

Solicitors: *Sharpe, Pritchard & Co. for P. K. S. Wilkinson, Crawley, Sussex; Peacock & Goddard for Bevan, Hancock & Co., Bristol.*

M. M. H.

C. A.
1956
Dec. 5, 6, 14.
Lord Goddard C.J., Morris L.J. and Vaisey J.

BALFOUR v. BARTY-KING AND ANOTHER. HYDER & SONS (BUILDERS) LTD., THIRD PARTIES.

Negligence—Fire—Escape of—Fire due to negligence of workmen employed by occupier of premises—Liability of occupier for spread of fire to adjoining premises—Whether fire due to act of stranger.

The defendants were the owners and occupiers of a dwelling-house which was contiguous to that of the plaintiff. On January 29, 1954, the second defendant employed an independent contractor to thaw frozen pipes in her loft, which contained a large quantity of combustible material. The independent contractor applied a blow lamp to the pipes which were, in parts, lagged with felt; the felt caught fire and the fire spread rapidly throughout the loft and to the plaintiff's house. The court found that the fire was caused by the negligence of the independent contractor because, although the use of a blow lamp was one of the normal methods of thawing pipes, it was negligent to use one in proximity to inflammable material:—

Held, that a householder was liable for an escape of fire from his premises to those of his neighbour where the fire was caused by the negligence of an independent contractor whom the householder had invited to his house to carry out work there, and, therefore, the defendants were liable in damages to the plaintiff.

Musgrove v. *Pandelis* [1919] 2 K.B. 43; 35 T.L.R. 299 applied.

Beaulieu v. *Finglam* (1401) Y.B. 2 Hen. 4, fo. 18, pl. 6 and *Turberville* v. *Stamp* (1698) 1 Ld.Raym. 264 considered.

Decision of Havers J. [1956] 1 W.L.R. 779; [1956] 2 All E.R. 555 affirmed.

APPEAL from Havers J.[1]

The defendants appealed from an order of Havers J. dated May 8, 1956, whereby he held that the defendants were liable for the escape of fire from their premises to the premises of the plaintiff, the fire having been caused by the negligent act of an independent contractor who was on the defendants' premises with their knowledge and permission.

The facts are set out in the judgment of the court.

Melford Stevenson Q.C. and *G. H. Crispin* for the defendants. There can be no liability at common law apart from statute, because the fire was not the defendants' fire. The second defendant did not start the fire. In all cases concerning fires starting in houses that give rise to strict liability the defendants had capacity to control the fire. In *Turberville* v. *Stamp*[2] the court said that liability depended on negligence, but emphasized that the fire was made on the defendant's ground with his material and by his order. In the present case there is no finding of authority or knowledge on the part of the second defendant. For liability to attach to the defendant the fire must be ignis suus. Here it was not the defendant's fire because she did not authorize the use of a blow lamp. Absolute liability is limited to cases where it is the defendant's own fire, because he can control a fire that is in his own house: see *Musgrove* v. *Pandelis*[3]; *Anonymous* case[4]; *Beaulieu* v. *Finglam*.[5] Liability of the householder for a fire started by his guest or his servant is based on some measure of control that he must have over it. In the present case the defendant did not even know fire would be used.

Black v. *Christchurch Finance Co.*[6] is distinguishable because in that case the contract between the defendant and the contractor expressly contemplated the lighting of a fire on the defendant's

[1] [1956] 1 W.L.R. 779; [1956] 2 All E.R. 555.

[2] (1698) 1 Ld.Raym. 264; 88 E.R. 1228; 12 Mod. 152.

[3] [1919] 2 K.B. 43; 35 T.L.R. 299.

[4] (1581) Cro.Eliz. 10.

[5] (1401) Y.B. 2 Hen. 4, fo. 18, pl. 6.

[6] [1894] A.C. 48.

C. A.
1956

Balfour v. Barty-King.

land. If a housewife asks plumbers to deal with frozen pipes, and leaves the manner of doing the work to their discretion, it would be wrong to assume that she must contemplate the use of a lighted blow lamp. This fire was caused by an act of collateral negligence of an independent contractor.

[Lord Goddard C.J. If the use of a blow lamp is one of the recognized methods of thawing frozen pipes, is there not an invitation to the workman to use that recognized method?]

The defendant would be liable only where the operation was *necessarily* attended by the use of fire: *per* Lord Watson in *Dalton* v. *Angus.*[7] Where an independent contractor can do the work in a number of ways and it is left to him to choose the method the employer is not liable if the contractor is negligent. *West* v. *Bristol Tramway Co.*[8] is distinguishable because there it was the defendants' own act which gave rise to the escape of fumes that damaged the plaintiff's land. *Honeywill & Stein* v. *Larkin Bros. (London's Commercial Photographers)*[9] is also distinguishable because the defendants' orders were to take the flashlight photograph. The operation of taking the photograph necessarily involved the combustion of magnesium which generated very great heat, and that method was reasonably within the contemplation of the defendants when they ordered a photograph of an interior.

Here there can be no liability under the rule in *Rylands* v. *Fletcher*[10] because, before liability under that rule can attach, the escape of the dangerous substance must be traceable to the defendant himself. That is not so here. An unignited blow lamp is not a *Rylands* v. *Fletcher*[10] object, because it is the fire that emerges from the lamp that is dangerous if it escapes. An unlighted blow lamp which, at most, is what the second defendant saw, cannot be regarded as a source of danger.

John Thompson Q.C. and *Bernard Caulfield* for the plaintiff. In English law fire does have special treatment when it escapes from one set of premises and involves damage to contiguous premises. Once it is shown that the fire had a negligent origin the Fire Prevention (Metropolis) Act, 1774, does not apply and one is thrown back on the common law. If negligence be shown, it matters not against whom, the fire is not accidental. At common law fire, like *Rylands* v. *Fletcher*[10] objects, is something in respect of which the plaintiff need only prove escape, and then the defendant must make good one of the *Rylands* v. *Fletcher*[10]

[7] (1881) 6 App.Cas. 740, 831.

[8] [1908] 2 K.B. 14; 24 T.L.R. 478.

[9] [1934] 1 K.B. 191; 50 T.L.R. 56.

[10] (1868) L.R. 3 H.L. 330.

defences, that is, act of the plaintiff, act of God, or act of a stranger. For what constitutes act of a stranger, see *Perry* v. *Kendricks Transport Ltd.*[11]; and see *per* Parker L.J.[12] as to the question of control. An occupier can control an independent contractor; the occupier's consenting to his presence implies control because of the occupier's dominion over the premises. That is clear from *Beaulieu* v. *Finglam.*[13]

The defendant, to escape liability, must show that the act (ex hypothesi the negligent act) was the act of a stranger: Salmond on Torts, 11th ed., p. 631. Here there was an escape of a non-accidental fire, and the occupier is liable unless he can make good one of the *Rylands* v. *Fletcher*[14] defences. The principle of *Honeywill & Stein* v. *Larkin Bros.*[15] is not limited to damage done by fire. In that case the defendants were not the occupiers of the theatre, and there was nothing in the facts to suggest that, by ordering a flashlight photograph of the theatre interior, they ordered a fire. The evidence there was that combustion was usual when taking a flashlight photograph; here the evidence is that it is usual to use a blow lamp to thaw out pipes. There is no distinction in principle between the two cases.

The operation of thawing pipes with a blow lamp, while usual, was an intrinsically dangerous operation in this loft. The defendants consented to and authorized it by failing to limit the method of achieving the result. Reliance is placed on *Hughes* v. *Percival*,[16] where an occupier was liable because one recognized way of achieving the desired result was hazardous. Apart from statute, escape of fire is something which on proof of its escape would have been treated as a *Rylands* v. *Fletcher*[17] escape. The effect of *Musgrove* v. *Pandelis*[18] is that if fire escapes, it becomes a *Rylands* v. *Fletcher*[19] object and the statute never operates. If before the passing of the Fire Prevention (Metropolis) Act, 1774, there was no defence for fire started in my house by someone there per mon congé, then the statute does not create a defence. The defendants have failed to show that at common law there was such a defence, hence they are liable.

The medieval rule probably still applies to escape of fire and the householder is liable for the action of his guests, family and licensees: see Holdsworth, History of English Law, Vol. XI, pp. 608, 609. Liability for escape of fire is no more restricted than that for the escape of any other dangerous substance. Only the act of a stranger is a defence: Salmond on Torts, 11th ed., pp. 629–631, 640. The present case is, a fortiori, a *Black* v. *Christchurch Finance Co.*[20] case. This liability is based on a man's dominion over his premises. It cannot be asserted that someone who is on premises with the occupier's leave can be said to be a stranger. The job the contractor had to do here, i.e., pipe-thawing, was extra hazardous. As to "suus ignus"—the fire is so called in the old Latin cases because it came from *his*, the defendant's, premises.

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[11] [1956] 1 W.L.R. 85; [1956] 1 All E.R. 154.

[12] [1956] 1 W.L.R. 85, 92.

[13] Y.B. 2 Hen. 4, fo. 18, pl. 6.

[14] (1868) L.R. 3 H.L. 330.

[15] [1934] 1 K.B. 191.

[16] (1883) 8 App.Cas. 443.

[17] L.R. 3 H.L. 330.

[18] [1919] 2 K.B. 43.

[19] L.R. 3 H.L. 330.

Melford Stevenson Q.C. in reply. The plaintiff's point on "suus ignus" is inaccurate: see *Turberville* v. *Stamp.*[21] In *Black* v. *Christchurch Finance Co.*[22] there was express authority to burn the bush in Australia. There was not here a vicarious liability for the negligent act of the independent contractor; the case did not fall within the class of cases where there is a duty to supervise the independent contractor.

Cur. adv. vult.

1956. Dec. 14. LORD GODDARD C.J. The judgment which I am about to deliver is the judgment of the court.

This is an appeal from a judgment of Havers J., who entered judgment for the plaintiff against the defendants, and also gave judgment for the defendants against the third parties. It arises out of a disastrous fire which took place at a house called Bitchett Wood, near Sevenoaks, and for which there is no doubt, on the findings of the judge, the third parties were responsible. Unfortunately, they have gone into liquidation and are apparently hopelessly insolvent. They have entered no appeal, and what this court has to determine is whether or not the plaintiff is entitled to maintain the action against the defendants.

Bitchett Wood is, we understand, a large country house which, like so many others, has been divided into separate dwelling-houses, and in the part known as Tudor Wing the defendants, Mr. and Mrs. Barty-King, lived. The plaintiff occupied another part, known as White Cottage, which adjoined and, indeed, was contiguous to Tudor Wing. At the end of January, 1954, there was a severe frost, and on January 29 Mrs. Barty-King discovered that the pipes and also the cistern that supplied water to her house (I shall refer to these two parts of Bitchett Wood as the plaintiff's and defendants' houses) had frozen. Being afraid that, as the central heating was on, the freezing up of the water supply might cause an explosion, she was naturally desirous of getting the system thawed out. It so happened that the third parties, who were builders, were engaged in erecting some houses in the neighbourhood, and she went to the site and asked the foreman or some person in authority if they could assist her by sending somebody to do the necessary work. Whoever she interviewed on behalf of the third parties agreed to do this, and the judge found that there was an employment by Mrs. Barty-KING Smith of the third parties, and that the service, or, as it turned out, disservice, which they rendered her was not a mere matter of courtesy, but a matter of business. They undertook to do the work. They sent two men to Tudor Wing. They came, provided with a blow lamp, some wire and, perhaps, some other tools, but neither of the men who came was a plumber. One of them, the one who eventually used the blow lamp, seems to have been a young apprentice carpenter, and no doubt if he had been a man of more experience he would not have attempted to do this small job in the highly dangerous way that caused the disaster.

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[20] [1894] A.C. 48.

[21] 1 Ld.Raym. 264.

[22] [1894] A.C. 48.

The cisterns were in a loft, and Mrs. Barty-King directed the men there. She knew they had a blow lamp. She assumed, naturally enough, that they were men fit to do the work, and she gave them no special instructions. This loft, however, had a great deal of combustible material in it. In addition to a certain amount of straw and rubbish, the pipes were, at any rate for the most part, lagged with felt. Mrs. Barty-King supplied the men with an electric lamp, and, as one would expect, she did not go up into the loft. The men traced the pipe and came to the conclusion, no doubt correctly, that the ice in the pipe was in the part that was lowest in the loft running along what was called the valley. There was a steady draught all the time in the loft, and it seems clear, and the judge found, that to apply a blow lamp to or near the pipe, even if the particular piece to which the heat was applied was unlagged, was a hazardous and dangerous way of doing the job, as the flame and heat necessarily came into contact with the felt lagging. At any rate, the felt lagging caught fire, the men tried to beat it out with their hands, the draught caused sparks to fly, and in an exceedingly short time the whole loft was on fire. The roof caught fire and it very quickly spread to White Cottage and caused a great amount of damage to that house, amounting to over £3,000.

It should perhaps be mentioned that in her evidence Mrs. Barty-King said that she thought that what was to be thawed out was the tank, as water was still coming through the pipes. No point was really made of this at the trial. The statement of claim alleged that these men were employed to thaw out the pipes and that was admitted in the defence. In view of what happened, we do not think it would really have made any difference, as the use of this blow lamp in the loft anywhere in the neighbourhood of the felt lagging was clearly a highly dangerous operation. The use of a blow lamp is no doubt a very common method of freeing frozen pipes. There are other methods and methods which should be used where it is dangerous to use a blow lamp, as it must be if it is used in the neighbourhood of combustible material. A heated brick, for instance, placed under the pipe at the spot where ice had formed would have been safe and equally efficacious. Mrs. Barty-King would naturally not concern herself with the way these men who had been sent to do the job set about it, nor, as we have said, was she, nor would one expect her to be, present in the loft when they were doing the work.

The question which this court has to consider is whether Havers J. was right in holding that for the spread of the fire from their premises to those of the plaintiff, the defendants are responsible, although the fire was caused by the negligence of independent contractors brought on to the defendants' premises to do the work that I have described. On this matter there seems to be no direct authority. From very early times it seems to have been recognized in our law that there is a special duty to guard against an escape of fire. It is perhaps not without interest to observe that in dealing with the meaning and derivation of "curfew," the Oxford Dictionary points out that its imposition was not an act of political repression. It was a precautionary measure, that people should not retire for the night and leave their fires burning. The Encyclopedia Britannica says that curfew was rung at Oxford in the days of Alfred the Great. In days when houses were built mainly of timber and when thatch was the commonest roofing, a spark might, and indeed in a country village may still, do almost incalculable damage.

The earliest case on the subject which the industry of counsel or our own researches have discovered is *Beaulieu* v. *Finglam*,[1] conveniently translated in Mr. Fifoot's History and Sources of the Common Law, 1st ed. (1949), p. 166. It will be noticed that the writ was founded upon a common custom of the realm and alleges that the defendant so negligently kept his fire (ignem suum) that the goods and chattels of the plaintiff were burnt. The court held that a man shall answer to his neighbour for each person who enters his house by his leave or knowledge or is a guest if he does any act with a candle or aught else whereby his neighbour's house is burnt. But, said the court, if a man from outside my house and against my will starts a fire in the thatch of my house or elsewhere whereby my house is burned and my neighbour's house is burned as well, for this I shall not be held bound, for this cannot be said to be done by wrong on my part, but is against my will. The next case to be found in the books is better known, *Turberville* v. *Stamp*.[2] The declaration alleged that, according to the law and custom of England, every man is bound to keep his fire safely and securely by day and by night lest for want of due keeping any damage in any manner happen, and then went on to allege that the defendant so negligently and improvidently kept his fire in a close of heath that for want of the due keeping the plaintiff's heath and furzes were burnt. In both these cases the first part of the declaration appears to assert an absolute duty to keep the fire safe, but, by the latter words, to claim in negligence. The court in *Turberville's* case,[3] after saying that a fire which a man makes in his field is as much his fire as his fire in his house, says that he must at his peril take care that it does not, through his neglect, injure his neighbour, but adds if he kindles it at a proper time and place and the violence of the wind carry it into his neighbour's ground, this is fit to be given in evidence, "but that here it is found to have "been by his negligence."

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[1] (1401) Y.B. 2 Hen. 4, fo. 18, pl. 6.

Sir William Holdsworth, in his History of English Law, Vol. XI, p. 607, thinks that by the time this case was decided, 1698, lawyers were beginning to think it was anomalous that a man should be liable for fire damage not caused by negligence, and that this was one of the reasons for the Act of 1707, 6 Anne, c. 31, which provided that no action should lie against any person in whose house a fire should accidentally begin. This provision was re-enacted in the Fire Prevention (Metropolis) Act, 1774, s. 86, an Act which has been held to extend to the whole country. That it was necessary to give this measure of exemption to householders seems to show that by the common law there was an absolute duty to prevent the escape of fire, and this was the opinion of Blackstone, who says (Commentaries I, p. 431) that the common law was altered by the Statute of Anne. The two cases cited above, however, show that at common law the act of God and the act of a stranger were exceptions, and in *Musgrove* v. *Pandelis* [4] it was held that the statute which protects the householder in the case of an accidental fire leaves the other heads of liability at common law untouched. The citation in that case from the judgment of Lord Denman C.J. in *Filliter* v. *Phippard* [5] shows that in his opinion the common law was that a person in whose house a fire originated and which afterwards spread to his neighbour's house was responsible for the damage, and it was to that liability that the statute was directed.

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[2] (1698) 1 Ld.Raym. 264.

[3] Ibid.

The precise meaning to be attached to "accidentally" has not been determined, but it is clear from these last two cited cases that where the fire is caused by negligence it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger.

Who, then, is a stranger? Clearly a trespasser would be in that category, but if a man is liable for the negligent act of his guest, it is, indeed, difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work on it, and who does the work in a negligent manner. We do not get much assistance from *Black* v. *Christchurch Finance Co.*,[6] though Holdsworth cites that case in support of his opinion that there is liability for the acts of a contractor in this respect. In that case the fire was certainly the fire of the defendants, for the contractor had been employed by them to make a fire to burn the scrub and saplings on the land, and in carrying out the work the contractor did a negligent act and one which was in breach of a stipulation in the contract. He started the fire in unfavourable weather. The lighting of the fire was not a casual, or, as it is sometimes put, a collateral act of negligence; it was the very thing that he was employed to do, and Lord Shand's judgment is really mainly concerned with whether, as he had disregarded a special term in the contract, the employers were liable.

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[4] [1919] 2 K.B. 43; 35 T.L.R. 299.

[5] (1847) 11 Q.B. 347, 354.

[6] [1894] A.C. 48.

C. A.
1956

BALFOUR
v.
BARTY-KING.

Mr. Stevenson's argument was that in the present case it was not the defendants' fire as the contractor was not employed to light a fire or to use a blow lamp or any other form of fire. But that is answered by the fact that the use of a blow lamp is an ordinary way of freeing frozen pipes. The negligence was in using the lamp in proximity to inflammable material. Mr. Stevenson also relied on the dictum of Lord Watson in *Dalton* v. *Angus*,[7] where he said: "When an employer contracts for "the performance of work, which properly conducted can "occasion no risk to his neighbour's house which he is under "obligation to support, he is not liable for damage arising from "the negligence of the contractor." This observation no doubt states the general rule with regard to liability, or the lack of it, for the negligence of an independent contractor; but the noble and learned Lord was not dealing with the case of the escape of a dangerous thing from land to which it has been brought or on which it has been created.

We do not think it is necessary to consider the doctrine of *Rylands* v. *Fletcher*[8] as a separate head of liability. No doubt the doctrine of that case applies to fire, and is subject to the exception of the damage being caused by a stranger.

In the recent case of *Perry* v. *Kendricks Transport Ltd.*[9] Parker L.J. referred to a stranger as a person over whom the defendant had no control. From one point of view it may be said that the test of an independent contractor is that he is left to carry out the work in his own way, but that is not, I think, the sense in which the Lord Justice is using the word "control." The defendants here had control over the contractor in that they chose him, they invited him to their premises to do work, and he could have been ordered to leave at any moment. It was left to the men who were sent how to do the work, and in our opinion the defendants are liable to the plaintiff for this lamentable occurrence, the more lamentable in that the persons ultimately responsible are insolvent.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Boodle, Hatfield & Co.; Barlow, Lyde & Gilbert.*

P. P.

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[7] (1881) 6 App.Cas. 740, 831.

[8] (1868) L.R. 3 H.L. 330.

[9] [1956] 1 W.L.R. 85, 92; [1956] 1 All E.R. 154.

1957
Jan. 15, 23.

Lord Goddard C.J., Cassels and Lynskey JJ.

NATIONAL ASSISTANCE BOARD *v.* TUGBY.

Bastardy—Affiliation order—National assistance—Application by National Assistance Board for order against putative father—Mother of illegitimate child married to putative father after birth of child—Child not legitimated by marriage of parents—Mother of child not a single woman quoad putative father—Right of board to order—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44 (2)*—Bastardy Laws Amendment Act,* 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

On the true construction of section 44 (2) of the National Assistance Act, 1948, the National Assistance Board are entitled to the issue of a summons under section 3 of the Bastardy Laws Amendment Act, 1872, directed to the man alleged to be the father of an illegitimate child, without proof that the mother of the child is a single woman within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872.

Where, therefore, the National Assistance Board applied under section 44 (2) of the Act of 1948, for a summons to be served under section 3 of the Act of 1872, upon the alleged father of an illegitimate child by reference to whose requirements assistance had been given under Part II of the Act of 1948 and the alleged father and the mother of the child were married, but the marriage had taken place after the birth of the child so that, although the circumstances were such that the child was not legitimated by the marriage of its parents, the mother was not a single woman for the purposes of the Bastardy Acts and was not therefore entitled to apply for a summons under section 3:—

Held, that the board, whose right to apply for a summons under section 44 (2) of the National Assistance Act, 1948, was independent of and separable from any right given to the mother by the Bastardy Acts, was entitled to the issue of a summons.

Obiter dicta in *National Assistance Board* v. *Mitchell* [1956] 1 Q.B. 53, 57, 58; [1955] 3 All E.R. 291 disapproved.

Case stated by Tynemouth justices sitting at North Shields.

On March 8, 1956, a complaint was preferred by the National Assistance Board against the defendant, Leonard Arthur Tugby, stating that he was alleged by Elsa Tugby to be the father of her child, Adam Tugby, born on July 1, 1952, and that assistance had been given under Part II of the National Assistance Act, 1948, on February 20, 1956, and other days, by reference to the requirements of the child, and applying under section 44 (2) of the National Assistance Act, 1948,[1] for a summons to be served on the defendant under section 3 of the Bastardy Laws Amendment Act, 1872, to answer the complaint.

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[1] National Assistance Act, 1948, s. 44: "(1) . . . where—(a) assistance is given under Part II of this "Act by reference to the requirements "of an illegitimate child . . . (2) If "no affiliation order is in force, the "Board . . . may within three years "from the time when the assistance

The following facts were found by the justices: On July 1, 1952, Elsa Lindsay gave birth to a male child named Adam, of which the defendant was the father. At the date of the birth of the child Elsa Lindsay was a spinster, and the birth of the child was registered in the registration district of Durham Central. The defendant and Elsa Lindsay gave information leading to the registration of the birth and the defendant signed the register as the child's father. The defendant had married one Iris Doreen Ada Smith on June 12, 1948, and that marriage was still subsisting at the date of the birth of the child Adam. The marriage between the defendant and Iris Doreen Ada Smith was dissolved by a decree absolute of divorce on April 21, 1953, and on September 12, 1953, the defendant married Elsa Lindsay at the register office, Tynemouth, which marriage was still subsisting. In March, 1955, the defendant and his wife separated by mutual consent (of which there was no written evidence); that separation was intended to be permanent and the defendant and his wife were still living apart. The defendant was not maintaining his wife or the child, but he had made a bona fide offer to his wife to the effect that he would support her and the child if they returned to live with him.

"was given . . . make application to "a court of summary jurisdiction "having jurisdiction in the place "where the mother of the child "resides for a summons to be served "under section 3 of the Bastardy "Laws Amendment Act, 1872. (3) In "any proceedings on an application "under the last foregoing subsection "the court shall hear such evidence "as the Board . . . may produce, in "addition to the evidence required to "be heard by section 4 of the said "Act of 1872, and shall in all other "respects . . . proceed as on an "application made by the mother "under the said section 3."

Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who "may be with child or who may "be delivered of a bastard child . . . "may either before the birth or at "any time within twelve months from "the birth of such child . . . make "application to any one justice of the "peace acting for the petty sessional "division of the . . . place in which "she may reside, for a summons to "be served on the man alleged by her "to be the father of the child, . . . "and such justice of the peace shall "thereupon issue his summons to the "person alleged to be the father of "such child . . ."

S. 4: ". . . on the appearance of "the person so summoned . . . the justices . . . shall hear the evidence of "such woman and such other evidence "as she may produce, and shall also "hear any evidence tendered by or "on behalf of the person alleged to "be the father, and if the evidence of "the mother be corroborated in some "material particular by other evidence "to the satisfaction of the . . . "justices, they may adjudge the man "to be the putative father of such "bastard child; and they may also, "if they see fit, . . . proceed to make "an order on the putative father for "the payment . . . of a sum of money "weekly . . . for the maintenance ". . . of the child."

That offer had been refused by his wife. Assistance was paid to the defendant's wife by reference to the child's requirements on February 20, 1956, and other days.

It was contended on behalf of the board: (a) that by virtue of section 1 (2) of the Legitimacy Act, 1926, the child was not legitimated by the subsequent marriage of his parents; (b) that section 42 (2) of the National Assistance Act, 1948, enacted that references to children in that Act included children of which a man had been adjudged to be the putative father and accordingly there was no liability on the defendant to maintain the child under that Act unless and until such an adjudication was made; and (c) that section 44 (2) of the National Assistance Act, 1948, empowered the board to apply for an affiliation order in all cases in which assistance was given under Part II of the Act by reference to the requirements of an illegitimate child and therefore it was not necessary for the board to prove that the child's mother was a single woman within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872.

The defendant appeared on the hearing of the complaint but was not legally represented. It was conceded by the board that there was authority for the proposition that the defendant's wife was not a single woman within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872.

The justices were of opinion that they were bound to have regard to the direction given to the magistrate by the Divisional Court in *National Assistance Board* v. *Mitchell*,[2] namely, that he was further to hear that case on the question whether the mother was a single woman within the meaning of the Bastardy Acts. They therefore directed their minds to the question whether Elsa Tugby was a single woman within the meaning of those Acts, and on the authority of *Mooney* v. *Mooney*[3] were of opinion that she could not be regarded as a single woman quoad her own husband, and they accordingly dismissed the complaint.

The board appealed.

Rodger Winn for the appellant board. It is not necessary for the National Assistance Board, on an application for a summons under section 44 (2) of the National Assistance Act, 1948, to show that the mother of the illegitimate child by reference to whose requirements the assistance was given was a single woman. The dicta to the contrary in *National Assistance Board* v. *Mitchell*[4] are obiter, for in that case the question for decision was whether, where the mother of the child was precluded from obtaining an affiliation order because more than 12 months had elapsed since the birth of the child and the alleged father had not paid anything for its maintenance, the board could apply for a summons at any time within three years from the time when the assistance was given. The question in this case, whether the board must show that the mother was a single woman, was not argued, nor was consideration of it necessary for the decision of the court. [Reference was also made to *Mooney* v. *Mooney*.[5]]

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[2] [1956] 1 Q.B. 53; [1955] 3 All E.R. 291.

[3] [1953] 1 Q.B. 38; [1952] 2 T.L.R. 711; [1952] 2 All E.R. 812.

Under the modern legislation the National Assistance Board have taken over the position of the Poor Law Guardians under the earlier Acts. The right of the guardians to recover payments made in respect of an illegitimate child was a direct and independent right: see *Guardians of the Poor of Plymouth* v. *Gibbs*,[6] where it was held that, although the mother of an illegitimate child had married after the birth of the child and was not a single woman, the justices could nevertheless make an order under section 5 of the Bastardy Laws Amendment Act, 1873 (which re-enacted section 8 of the Act of 1872) in favour of the guardians. Section 44 of the National Assistance Act, 1948, replaces and has the same effect as section 5 of the Act of 1873, but the difficulty which troubled the court in *Guardians of the Poor of Plymouth* v. *Gibbs*,[6] as to the dual liability of the putative father and the husband, cannot arise under the Act of 1948, because the husband of the mother of an illegitimate child would not be liable for its maintenance unless he had been adjudged the putative father.

There is a distinction between the qualifications which a mother must show on an application under section 3 of the Act of 1872, which is a procedural section, and the substantive requirements as to the evidence upon the hearing of the summons contained in section 4. Section 44 (2) of the National Assistance Act, 1948, gives to the board the right to apply for a summons, and subsection (3) deals with what must be proved at the hearing on the return of the summons and refers back, in the same way as did section 5 of the Act of 1873, to section 4 of the Act of 1872 as to the evidence which the justices must hear. Section 44 (2) is a procedural subsection which modifies section 3 of the Act of 1872 so far as qualifications for making the application are

[4] [1956] 1 Q.B. 53, 57, 58.

[5] [1953] 1 Q.B. 38.

[6] [1903] 1 K.B. 177; 19 T.L.R. 11.

concerned; so that, unlike the case of an application by a mother, the board are not obliged to show that the mother was a single woman, but are entitled to the issue of a summons merely on proof that within three years of the application assistance was given by reference to the requirements of an illegitimate child and that no affiliation order was in force. The board's right to apply for a summons under section 44 is independent of the mother's right under section 3 of the Act of 1872 in regard to the time within which the application is made: *National Assistance Board* v. *Mitchell* [7]; it is submitted that it is equally independent of the mother's right so far as other matters are concerned. [Reference was also made to *Taylor* v. *Parry*.[8]]

The defendant did not appear and was not represented.

Cur. adv. vult.

January 23. Lord Goddard C.J. Lynskey J. will read the first judgment.

Lynskey J. This is an appeal by way of case stated by the justices of Tynemouth against their adjudication on May 17, 1956, refusing an application by the National Assistance Board (the appellants) under section 44 (2) of the National Assistance Act, 1948, for a summons to be served on Leonard Arthur Tugby (the defendant) under section 3 of the Bastardy Laws Amendment Act, 1872.

On March 8, 1956, a complaint was preferred by the board against the defendant stating that he was alleged by Elsa Tugby to be the father of her child, Adam Tugby, born on July 1, 1952, and that assistance had been given under Part II of the National Assistance Act, 1948, on February 20, 1956, and divers other days by reference to the requirements of the child and applying under section 44 (2) of the Act for a summons to be served on the defendant under section 3 of the Bastardy Laws Amendment Act, 1872, to answer the complaint. The application, therefore, was for the issue of a summons and not for an order that might be made on the hearing of such a summons.

[His Lordship stated the facts found by the justices as set out above and continued:] Upon these findings of fact the justices decided, and in our view rightly decided, that the child was not legitimated by the subsequent marriage of his parents. They also decided, and again we think rightly decided, that Elsa Tugby was not a single woman quoad her husband within the meaning of section 3 of the Bastardy Laws Amendment Act, 1872, and she would therefore not be entitled to apply for a summons to be served on the defendant under that section.

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[7] [1956] 1 Q.B. 53.

[8] [1951] 2 K.B. 442; [1951] 1 T.L.R. 509; [1951] 1 All E.R. 355.

It was contended before the justices and before us that section 44 (2) of the National Assistance Act, 1948, empowered the board to apply for a summons to be served under section 3 of the Bastardy Laws Amendment Act, 1872, in all cases in which assistance is given under Part II of the National Assistance Act, 1948, by reference to the requirements of an illegitimate child, irrespective of whether the mother could have applied or not, and without proof that the mother was a single woman within the meaning of section 3 of the Act of 1872.

Whether this contention is correct depends upon the question of what is the true construction of section 44 (2) of the National Assistance Act, 1948. Section 44 (2) provides: "If no affiliation "order is in force, the board or local authority may within three "years from the time when the assistance was given or accom- "modation provided make application to a court of summary "jurisdiction having jurisdiction in the place where the mother of "the child resides for a summons to be served under section 3 of "the Bastardy Laws Amendment Act, 1872." On the wording of the subsection all that the board have to show in order to obtain a summons under section 3 of the Act of 1872 is (a) that there is no affiliation order in force; (b) that assistance has been given or accommodation provided; and (c) that such assistance has been given or accommodation provided within three years of the date of the application. The summons under section 3 of the Bastardy Laws Amendment Act, 1872, is a summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division of the city, borough or other place for which the justice usually sits.

It is true that under section 3 of the Bastardy Act, 1872, before a mother can obtain the issue of a summons she must show that she is a single woman about to give birth or that she has given birth to an illegitimate child within 12 months of the date of the application, unless the man alleged to be the father of the child has made payments within 12 months of the birth in respect of the maintenance of the child or has been out of the country within that 12 months. But, having shown these things, only then is she in a position to apply for and obtain a summons, a position in which the board or a local authority are put upon proof of the matters set out in section 44 (2) of the Act of 1948.

Section 4 of the Bastardy Act, 1872, deals with what has to be proved at the hearing of the summons before an affiliation order, or an order for maintenance, can be made.

Section 44 (3) of the Act of 1948 deals with the evidence which may be adduced, including the evidence required to be heard by section 4 of the Act of 1872 and, subject to the provisions of the following subsections, proceedings are to be as on an application by the mother under section 3. The effect of section 44 is to give the board a right independent of and separable from any right given to the mother by the Bastardy Acts, and even though she herself has lost her right by effluxion of time or otherwise by marriage to apply.

Under section 5 of the Bastardy Laws Amendment Act, 1873, which repealed and re-enacted section 8 of the Act of 1872, where a bastard child became chargeable to a union or parish the guardians might apply for a summons directed to the man alleged to be the father to show cause why an order should not be made upon him to contribute to the relief of the child, and upon the hearing of the summons, upon proof being given as in the section provided, the justices might adjudge the man the putative father of the child and make an order for payment towards the relief of the child.

In the *Guardians of the Poor of Plymouth* v. *Gibbs*[1] this court held that where an illegitimate child was being maintained by the guardians of a union or parish, justices have jurisdiction upon the application of the guardians to make an affiliation order against the putative father of the child under section 5 of the Bastardy Laws Amendment Act, 1873, notwithstanding that the child's mother had married and her husband was able to maintain it.

Assistance previously given by parishes and the Poor Law Guardians is now given by the National Assistance Board. The National Assistance Act, 1948, repealed the provisions of section 5 of the Bastardy Laws Amendment Act, 1873, and gave the National Assistance Board and local authorities the powers contained in section 44 of the Act of 1948.

Section 44 (2) of the Act of 1948 was considered by this court in *National Assistance Board* v. *Mitchell*.[2] The point for decision in that case was, where the mother of two illegitimate children had not taken proceedings within 12 months of the birth and had thereby lost her right to take such proceedings, whether the National Assistance Board could bring proceedings under section 44 within three years of the assistance being given. This court held that the board's right to apply for an order under the Act of 1948 was entirely separate from the mother's right under the Act of 1872, and provided that the board applied within three years of the date on which they last gave assistance they were entitled to apply for an order on proving that the children were bastards in respect of whom an order could have been made under the Act of 1872.

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[1] [1903] 1 K.B. 177; 19 T.L.R. 11.

[2] [1956] 1 Q.B. 53; [1955] 3 All E.R. 291.

In that case it seems to have been assumed without argument that it would be necessary for the board to prove that the mother was a single woman for the purposes of the Bastardy Acts before the board could obtain an order under section 44 (2). The point did not arise directly for decision. Having had the point now argued before us, we take the view that upon the true construction of section 44 (2) the board are entitled to an order without proof that the mother is a single woman within the meaning of section 3 of the Bastardy Laws Amendment Act of 1872.

The case should be remitted to the justices with this opinion.

CASSELS J. I agree with the judgment which has just been delivered by Lynskey J.

LORD GODDARD C.J. I also agree with the judgment which has just been delivered by Lynskey J. In fairness to the justices from whom we are differing, I desire to say that I recognize that in remitting the case of *National Assistance Board* v. *Mitchell*[3] to the magistrate for further consideration both Ormerod J.[4] and I[5] indicated that he should consider, among other things, whether the mother was a single woman for the purposes of the Bastardy Acts, and the other member of the court concurred. This was unnecessary for the actual decision of the case and must be regarded as obiter. It seems from the report of the judgments and of counsel's argument, and only one side was represented, that all concerned were under the impression that whether the mother was or was not to be regarded as a single woman was a matter which the justices would have to determine. The matter having now been fully argued and this question falling for direct

[3] [1956] 1 Q.B. 53.

[4] Ibid. 58.

[5] Ibid. 57.

decision, I am satisfied that those dicta were wrong. I regret that the justices, who naturally and properly followed this expression of opinion, were thus misled.

Appeal allowed.

Solicitor: *Solicitor, National Assistance Board.*

J. F. L.

1957
Jan. 28, 29.

Devlin J.

ATTORNEY-GENERAL *v.* BASTOW.

[1954 A. No. 2610.]

Town and Country Planning—Enforcement notice—Non-compliance—Repeated offences under Town and Country Planning Act, 1947, *s.* 24 (3)—*Infringement of public right—Relator action by Attorney-General—Remedy by way of injunction—Jurisdiction—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24 (3).
Injunction—Relator action—Attorney-General's discretion. Attorney-General—Functions—Administrative discretion.

Despite the refusal of his application for permission to develop his land as a caravan site, the defendant began and continued to use his land for parking caravans for human habitation. On May 8, 1952, the local authority served on him an enforcement notice pursuant to the Town and Country Planning Act, 1947, s. 23, requiring him to discontinue using the land as a caravan site and to remove the caravans. The defendant refused to do so, and on September 3, 1953, January 14, 1954, and April 6, 1954, he was convicted by a court of summary jurisdiction of offences under section 24 (3) [1] of the Act and fined £20, £30 and £75 respectively. He failed to pay the last fine and was sentenced to one month's imprisonment in default. On October 8, 1954, the Attorney-General, on the relation of the local planning authority, issued a writ claiming an injunction perpetually restraining the defendant from using the land or causing or permitting it to be used as a caravan site. After the issue of the writ, on January 27, 1955, the defendant was charged before a court of summary jurisdiction with an offence under section 24 (3) in his continuance of the wrongful user of the land for 278 days after his previous conviction. He was fined £100, which he failed to pay, and was sentenced to three months' imprisonment in default:—

Held, (1) that since the Attorney-General was seeking to enforce a public right, the court had jurisdiction to grant a remedy by way of injunction.

Dictum of Buckley J. in *Attorney-General* v. *Ashborne Recreation Ground Co.* [1903] 1 Ch. 101, 107; 19 T.L.R. 39 followed.

(2) Granting the injunction, that once a clear breach of the public right was established and the Attorney-General sought an injunction in the High Court as being the most effective method open to him of enforcing that right, the court should refuse to grant the injunction only in exceptional circumstances.

Per curiam. The choice of methods for the enforcement of the law was primarily a matter of administrative discretion for the Attorney-General.

ACTION.

On August 8, 1951, the defendant, Edward Henry Bastow, made application to the Hornchurch Urban District Council, the local planning authority under the Town and Country Planning Act, 1947, for permission to develop as a caravan site certain land in Rainham, Essex, of which he was the owner. On September 5, 1951, the application was refused, and on March 8, 1952, the application was reviewed and again refused on April 9, 1952. Notwithstanding the refusal of his applications, the defendant began and continued to use the land as a site for caravans for human habitation. On May 8, 1952, the council served on the defendant an enforcement notice pursuant to section 23 of the Town and Country Planning Act requiring him within seven days of the date on which the notice should take effect to discontinue the use of the land as a caravan site and to remove the caravans parked on the land. The defendant appealed against the enforcement notice to the Minister and the appeal was dismissed. The enforcement notice took effect on June 7, 1952, but the defendant continued throughout to keep the caravans on his land.

In or about May, 1953, the council took proceedings by way of information in a court of summary jurisdiction, and on September 3 the defendant was convicted of an offence under section 24 (3)[1] of the Act by reason of his failure to comply with the enforcement notice, and was fined £20 and ordered to pay costs. The defendant, however, continued to use the land for the prohibited purpose, and on January 14, 1954, he was again convicted and fined £30. On April 6, 1954, at a court of summary jurisdiction, the defendant pleaded guilty to the further offence of

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[1] Town and Country Planning Act, 1947, s. 24 (3): "Where, by virtue of "an enforcement notice, any use of "land is required to be discontinued, ". . . then if any person, without the "grant of permission in that behalf "under this Part of this Act, uses the "land or causes or permits the land "to be used, . . . in contravention of "the notice, he shall be guilty of an "offence and liable on summary con- "viction to a fine not exceeding £50; "and if the use is continued after the "conviction, he shall be guilty of a "further offence and liable on sum- "mary conviction to a fine not exceed- "ing £20 for every day on which the "use is so continued."

1957

ATTORNEY-GENERAL v. BASTOW.

continuing the said use and was fined £75. He failed to pay this fine and on May 5, 1954, he was sentenced to one month's imprisonment.

On October 8, 1954, the Attorney-General issued a writ on the relation of the Hornchurch Urban District Council claiming an injunction perpetually restraining the defendant from using the land or causing or permitting it to be used as a site for caravans for human habitation without the grant of planning permission pursuant to the Town and Country Planning Act. After the issue of the writ on January 27, 1955, the defendant was again charged before the magistrates with the offence against the Town and Country Planning Act and having unlawfully continued to use the land for 278 days after his previous conviction. He was fined £100, which he failed to pay, and sentenced, in default, to three months' imprisonment. Throughout the defendant continued in breach of the Act and at the date of the hearing he was still in breach.

J. P. Widgery for the plaintiff. There is jurisdiction in the High Court, if a right, including a public right, has been infringed, to grant a remedy by way of injunction in a case where the statute itself prescribes what steps are to be taken to enforce the law. In an action brought by the Attorney-General on the relation of a local authority the High Court can enforce the by-laws of the local authority: *Attorney-General* v. *Ashborne Recreation Ground Co.*[2]; there the obligation was created by statute and unknown to the common law. *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*[3] gives an example of a public right which was purely a creature of statute. In *Devonport Corporation* v. *Tozer*[4] the plaintiffs failed because they did not join the Attorney-General; there there was only a breach of the corporation's by-laws and no breach of a statute. The Attorney-General has been held not entitled to bring proceedings where no public interest is involved: see *Attorney-General and Spalding Rural Council* v. *Garner.*[5] *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*[6] supports the following propositions: (1) The existence of a public right, even though created by statute, is sufficient to support a relator action. (2) The fact that the Act prescribes the penalty for a breach is no bar to proceedings.

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[2] [1903] 1 Ch. 101; 19 T.L.R. 39.

[3] [1904] 2 Ch. 34; 20 T.L.R. 489.

[4] [1903] 1 Ch. 759 (C.A.); 19 T.L.R. 257.

[5] [1907] 2 K.B. 480; 23 T.L.R. 563.

[6] [1904] 2 Ch. 34.

(3) The fact that the penalty has been enforced is no bar to proceedings. It need not be shown that the maximum statutory penalty has been enforced before an injunction can be sought in the High Court. Here the local authority have done everything reasonable and, therefore, it is open to them to bring an action and it is a proper case for an injunction. The public right in the *Wimbledon* case[6] was the same type of right as the Attorney-General seeks to enforce here.

[DEVLIN J. In this case the magistrates can do in effect all that the High Court can do. They can, under the Act, fine the defendant £20 for every day that he fails to comply.]

This court can, if it grants an injunction with which the defendant fails to comply, send him to prison until the user is discontinued. The magistrates can only send him to prison for a specific period. If this court in its discretion takes the view that an injunction is an inappropriate remedy, because the council should have done more and there was a reserve of enforcement remaining to them, then it will be taking a stricter view than that taken by Buckley J. in the *Ashborne* case,[7] or by Farwell J. in the *Wimbledon* case.[8] Where a clear breach of a public right is established, an injunction will be granted at the suit of the Attorney-General unless there is good reason for not doing so: see *per* Buckley J. in the *Ashborne* case.[9]

There is always a residual discretion in this court to grant the injunction. It is for the Attorney-General in his absolute discretion to consider whether the case is strong enough to set the court in motion; and the fact that he has given his consent to the proceedings is a matter for consideration by the court. No inquiry should be made into the Attorney-General's reasons for his actions: *London County Council* v. *Attorney-General.*[10] If the Attorney-General, on the breach of a public right, asks for an injunction, it should be granted unless there is some good ground for refusing it, for example, laches. There is no danger of the High Court being overwhelmed with applications of this nature, because only an application specifically authorized by the Attorney-General merits a hearing in the High Court.

L. J. Davies for the defendant. The remedies provided by the Act are so comprehensive and adequate that it follows by necessary implication that the Act excludes proceedings for an injunction in the High Court. The provisions of the Act are indeed so inconsistent with proceedings for an injunction that the court should refuse to grant one. On appeal to petty sessions the magistrates have power to vary a notice under section 24 (3); they are, therefore, in that respect acting in an administrative capacity. If an appellant goes to petty sessions, and from there to quarter sessions, and proceedings for an injunction are thereafter allowed, there is a transfer of proceedings from a court of summary jurisdiction to the High Court where different canons are applied. It is undesirable that matters should be taken out of the hands of a court of summary jurisdiction and started afresh in the High Court.

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[6] [1904] 2 Ch. 34.
[7] [1903] 1 Ch. 101.
[8] [1904] 2 Ch. 34.
[9] [1903] 1 Ch. 101, 107.
[10] [1902] A.C. 165; 18 T.L.R. 298.

Before an injunction can be granted it must be established that there is no other efficient remedy provided by the statute. Here the local authority has not exhausted the remedies provided by the Act—they served enforcement notices on the owners and occupiers of all the caravans, but never proceeded against them individually. An injunction gives no greater guarantee of deterrence than any other statutory penalty. The proper course was for the council to proceed against the individual caravan owners. In the *Wimbledon* case [11] and the *Ashborne* case [12] the statutory penalties were useless, therefore those cases are distinguishable. Before an injunction can be granted there must be a public right to be protected: *per* Buckley J. in the *Ashborne* case.[13] Here the plaintiff is not asking for the protection of a public right but only for an added means of enforcing compliance with the enforcement notice. In other Acts which were the subject of relator proceedings there was a direct or specific prohibition; but there is no specific offence created in the body of the Town and Country Planning Act. The public right here is defined by the local planning authority and the court of summary jurisdiction and not by the Act. It is not, therefore, the sort of right that an injunction should be used to protect. If an injunction does lie as a remedy in this case it should not as a matter of discretion be granted, because the remedies given by the Act have not been exhausted.

DEVLIN J. stated the facts and continued: The first question is whether there is jurisdiction in this court to grant a remedy by way of injunction in a case where the statute itself prescribes what steps are to be taken to enforce the law. The second question, if I find that I have jurisdiction, is whether it is a proper case for me to grant an injunction.

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[11] [1904] 2 Ch. 34.

[12] [1903] 1 Ch. 101.

[13] Ibid. 107.

On the first point Mr. Widgery, for the Attorney-General, has relied on two authorities, both decisions at first instance. The first is *Attorney-General* v. *Ashborne Recreation Ground Co.*,[1] a decision of Buckley J. The second is a decision of Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*[2] Those cases establish that a remedy by injunction for a breach of a statute exists only if a right has been infringed. The mere fact that an illegality has been committed because the provisions of a statute have been broken is not, of itself, enough. The statute, presumably, will provide for what is to happen in such circumstances by way of a penalty, as it does provide in this case, and no other remedy is open unless, as I say, a right has been infringed. However, the judgment of Buckley J. also decides that, for this purpose, a public right is sufficient if the suit be by the Attorney-General, who is the only authority who has a right to bring a civil suit upon the infringement of public rights.

Buckley J. said[3]: "Then it is argued that the defendants' "objection can be sustained because the plaintiffs' claim is not "based on any right of property, but only on the fact that what "has been done is an interference with public rights in respect "of a highway. I think that is not sound. The Attorney-General "suing in respect of the invasion of public rights has at least as "large a right to invoke the protection of the court as a private "owner suing in respect of his rights." Then he cites authority to support that view.

That judgment of Buckley J. was followed by Farwell J. in the later case[4] to which I have referred. They are judgments at first instance and, therefore, not absolutely binding upon me as authority, but they are judgments that have stood for half a century. If a different view of the law is to be taken, in my view it is right that it should be taken by a higher court. I follow, therefore, the principle that has been laid down by Buckley J. I am satisfied that in this case the Attorney-General is seeking to enforce a public right and, therefore, that I have jurisdiction to grant an injunction in a proper case. It is nonetheless a public right because it is one which has been given by the statute which, in this case, has been infringed. When Parliament makes provision which enables local authorities to exercise powers over the use of land, that provision is plainly made with the object of

[1] [1903] 1 Ch. 101; 19 T.L.R. 39.
[2] [1904] 2 Ch. 34; 20 T.L.R. 489.
[3] [1903] 1 Ch. 101, 107.
[4] [1904] 2 Ch. 34.

conferring a right upon the public because Parliament considers that the public is entitled not to have the land used in ways which may be considered to be unhealthy and offensive. To that extent, the rights of private property are to be interfered with. There is the creation of a public right and the Attorney-General is, therefore, entitled to come to this court to have it enforced.

That still leaves the second question, whether or not it is a proper case for the grant of an injunction by this court. It is quite plain that this court is not concerned with the reasons which have seemed good to the Attorney-General in causing him to bring this action. Obviously if, upon every occasion that an offence were committed which involved the invasion of a public right, and which is normally dealt with by a magistrate's court by the imposition of a small fine, the Attorney-General were to take the matter up and ask for an injunction in this court, the work of the court would become impossible, but it is for the Attorney-General to decide what cases he considers it right to deal with in this way. Lord Halsbury L.C., in *London County Council* v. *Attorney-General*,[5] said this[6]: "It may well be that it is true "that the Attorney-General ought not to put into operation the "whole machinery of the first law officer of the Crown in order "to bring into court some trifling matter. But if he did, it would "not go to his jurisdiction; it would go, I think, to the conduct "of his office, and it might be made, perhaps in Parliament, the "subject of adverse comment; but what right has a court of law "to intervene?"

A relator action is, of course, one which the Attorney-General himself authorizes, and over which he retains complete control. I must and do regard it as an action brought by him personally. As to its nature, Professor Stuart Robertson, in his work Civil Proceedings by and against the Crown (1908), p. 465, quotes a passage from *Attorney-General* v. *Cockermouth Local Board*[7] in the following terms: "Except for the purposes of costs there is "no difference in substance between an ex-officio information "and an information at the relation of a private individual. In "both cases the Sovereign, as parens patriae, sues by the "Attorney-General."

I have referred to these matters because it is necessary to bear in mind the character of a relator action in considering whether or not it is a proper case for the court to exercise its discretion. The fact that the Attorney-General asks for the injunction does not mean that the court must grant it, even if a clear and deliberate invasion of a public right is proved. The court still has its discretion in the matter and it must have regard to the circumstances to which it usually has regard in considering whether or not it will grant this type of relief.

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[5] [1902] A.C. 165; 18 T.L.R. 298.

[6] [1902] A.C. 165, 168.

[7] (1874) L.R. 18 Eq. 172.

One of the circumstances to which it should have regard is whether are not there are other remedies open either to the Attorney-General or to the relator which might be equally effective. In having regard to it, the court must bear this in mind: the Attorney-General, being the first law officer of the Crown, is primarily responsible for the enforcement of the law. If he considers it necessary to come by way of a relator action to ask for the assistance of the court in enforcing obedience to a clear provision of the law, the court, although retaining its discretion, ought to be slow to say that the Attorney-General should first have exhausted other remedies. In any doubtful case—where it may be questionable whether or not other remedies had been fully exhausted—the court would be slow to interfere with the decision, which the Attorney-General must have made in authorizing this action, that it was a case where the ordinary remedies would no longer prevail. I say that because when the writ was issued in this action there might have been some doubt whether the efficacy of the proceedings prescribed by the Act had been displaced. When this action was begun, three informations had been brought; the defendant had been fined a substantial sum, which he had not paid, and he had served a sentence of one month's imprisonment in default. It seems to me, however, difficult to say that at that time the remedies provided by the Act had been thoroughly exhausted. The magistrates had not passed the maximum sentence, and they had not been asked to do so. It would be difficult for the plaintiff to say that the remedies had been fully exhausted and that there was nothing more that the magistrates could do when, in fact, he went back and asked the magistrates to do more and they exercised their powers to the full, by imposing the maximum sentence because the defendant had defied the court. It may be that if the magistrates had made it plain that they would continue, if necessary, to pass that sentence until such time as the defendant decided to comply, it would have been efficacious, and in that case the public rights would have been protected, perhaps, a year-and-a-half or more ago.

Therefore, at the time the writ was issued it was at least a matter of doubt whether the ordinary remedies had been exhausted. Two matters, however, fall for consideration. The first is that I have to consider the matter now, when I am invited to grant an injunction, and not when the writ was issued. Whatever the position may have been at that time, the position now is plain, that the maximum sentence that can be imposed by the magistrates has not deterred the defendant from continuing to defy the law. He has continued in breach of it and is in breach of it now. It is true that if an injunction is granted and it is disobeyed, the result may be that the court will commit the defendant to prison, and it may be said that that is only exercising the same power as the magistrates have. They could continue to send him to prison for a maximum period of three months: the amount of the fine could be made so large that the defendant could not pay it and, by a succession of sentences, the magistrates could achieve just as good a result as this court can achieve.

However, I think it must be a matter of administrative discretion whether the enforcement of the law, in the face of someone who is determined to defy it, is best achieved by going to the police court in a series of applications of that nature, or by going to the High Court and asking it to use its powers, which would amount to the imposition, if necessary, of an indefinite sentence until such time as the defendant has purged his contempt. That must be a matter of administrative discretion, and so, also, is the choice between the other alternatives to which Mr. Davies—who, in the course of his argument, has urged everything that could possibly be urged on behalf of the defendant—has drawn attention. He has submitted that it would be open to the local authority, under section 24 (1) of the Act, to remove the caravans, and that that would be a much more satisfactory way of securing compliance with the law than by granting an injunction and imposing a term of imprisonment if it is disobeyed. Whether that power in fact exists depends upon what is meant by "any use of land" as that term is used in section 24 (1). I think it might be doubtful, in this case, whether it does exist, but, whether it exists or not, again the choice of methods for the enforcement of the law is primarily a matter for administrative discretion.

I distinguish, therefore, between administrative discretion and judicial discretion. The Attorney-General, as I say, is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective is to ask this court for a mandatory injunction—and I am satisfied that the very nature of a relator action means that he has surveyed those ways and has come to that conclusion—then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances. I am dealing purely with that type of case in which the only substantial ground for not granting an injunction is that there are other remedies available. In cases where other circumstances which are not primarily a matter for administrative discretion arise, then different considerations might apply and a different view be taken.

I think, therefore, that the plaintiff has satisfied me that I have jurisdiction to grant the relief sought, and that it is a proper case in which I ought to grant that relief.

Injunction granted.

Solicitors: *Sharpe, Pritchard & Co. for P. L. Cox, Hornchurch; Jas. H. Fellowes.*

P. P.

PERSONAL REPRESENTATIVES OF TULL, DECD. *v.* SECRETARY OF STATE FOR AIR.

C. A.

1957
Jan. 21, 22.

Denning, Romer and Sellers L.JJ.

Compulsory Purchase—Compensation—Licensed inn—Licence put in suspense—Inn leased to brewers—Reversion to freeholders—Basis of compensation payable to freeholders — Value as licensed premises less value of suspended licence—Defence Acts, 1842–1935—*Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 12, *Sch. I.*

In March, 1952, the Secretary of State for Air compulsorily acquired under the Defence Acts, 1842 to 1935, a licensed inn, the freeholders of which were the personal representatives of one T. deceased, and the lessees a firm of brewers who were in occupation under a lease which still had three and a half years to run. The reversion was owned by the freeholders and the lease stipulated that at the end of the lease the lessees were to return the licence to the freeholders. On the compulsory acquisition the licence was put into suspense in the joint names of lessors and lessees, under the provisions of the Finance Act, 1946. The brewers did not apply for the licence to be removed to other premises and the compensation payable to them for disturbance was still the subject of negotiation.

The question raised by the present appeal was whether the compensation payable to the freeholders should be assessed merely on the value of a house which was adapted and suitable for use

C. A.
1957

TULL'S PERSONAL REPRESENTATIVES v. SECRETARY OF STATE FOR AIR.

as licensed premises, or, as the freeholders claimed and the Lands Tribunal found, as a house which was in fact licensed, credit being given for the value of the licence in suspense:—

Held, that it had long been settled by the courts that an owner whose property had been compulsorily acquired was entitled to receive in compensation a money payment not less than the loss imposed on him in the public interest, but no greater. The freeholders were therefore entitled to recover not only the agreed value of the freehold reversion but also the increase in value due to the premises being licensed premises, but they must give credit for the value of the suspended licence.

Belton v. *London County Council* (1893) 9 T.L.R. 232; *Fitzwilliam (Earl)* v. *Commissioners of Inland Revenue* [1914] A.C. 753; and *Horn* v. *Sunderland Corporation* [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480 applied.

Held, further, that the basis of compensation which existed before the passing of the Finance Act, 1946, still held good, subject to credit being given for the value of the suspended licence.

Passage in Halsbury's Laws of England, 3rd edition, Vol. 10, p. 165 not approved.

CASE STATED by the Lands Tribunal.

In March, 1952, under the provisions of the Defence Acts, 1842 to 1935, the Secretary of State for Air compulsorily took possession, for the purposes of the Air Force, of the "Volunteer "Inn" at Crookham Common, near Newbury, Berkshire. The freeholders of the licensed premises were the personal representatives of Albert Sancton Blyth Tull, deceased, and the firm of H. & G. Simonds Ltd., brewers, were in occupation under a lease granted by Tull which had three and a half years to run. The lease contained a stipulation that at the end of the lease the lessees would do everything possible to transfer the licence back to the lessor. When the compulsory acquisition of the premises took place the licence was not destroyed but was put in suspense, in the joint names of the freeholders and the brewers, under the provisions of the Finance Act, 1946. The brewers did not apply for the licence to be removed to other premises, either under an ordinary or a special removal, and the amount of compensation payable to them was the subject of negotiation.

The present appeal was brought by the Secretary of State for Air to determine the compensation payable to the Tull estate. The Lands Tribunal, affirming the valuation by the claimants' valuer, had fixed the compensation at £4,500: freehold reversion £3,900; licence, regarded as a current licence, £800, less £200 value of suspended licence.

The appellants, the acquiring authority, contended that the compensation payable should include nothing for the fact that it was a licensed house, they having acquired only the house and not the licence, which latter remained intact in the hands of the holders and available for use when an opportunity arrived; and that, accordingly, compensation should be assessed on the value of the house as a house adapted and suitable for use as licensed premises, but not as a house which was in fact licensed. The value of the freehold reversion was agreed at £3,900.

The claimants' contention was that the compensation payable was the value of the reversion as a licensed house, namely, £4,700, less £200, the value of the suspended licence.

B. S. Wingate-Saul for the appellants. On the facts of this particular case the claimants are entitled to compensation only on the value of the freehold premises as being suitable and adapted for use as licensed premises and not as being in fact licensed. That value is £3,900. When the premises were acquired by the Air Ministry the licence was put into suspense, in the joint names of the lessees and the lessors under the provisions of the Finance Act, 1946. When a licence is put into suspense it can be transferred by the holder, while it is in suspense, to another holder, or it can be transferred, on application to the licensing justices, to other premises by an ordinary removal or a special removal under the Licensing (Consolidation) Act, 1910. A licence in suspense retains its monopoly value. Here the brewers, who were in occupation at the time of the acquisition, did nothing. The claimants, not being in occupation, had no interest in the licence at the time of the suspense, and it is submitted that a disturbance claim, which is not a creature of a statute but of judicial determination, only arises in cases in which the person claiming is either resident at or carrying on business in the premises acquired. When put in suspense a licence is detached from the premises to which it belonged until such time as it is brought out of suspense (see Finance Act, 1946, s. 12). If compensation cannot be claimed for the value of the licence under disturbance, there is no other heading under which it can be claimed, because the premises compulsorily acquired are not licensed but ex-licensed. Disturbance cannot be a valid claim unless the premises acquired are premises in which the interest of the claimant has been disturbed. In *Horn* v. *Sunderland Corporation*[1] Scott L.J. listed the principles on which compensation should be based, but this present case goes far beyond anything in that case. In this case the notice to treat for acquisition did not apply to the licence but only to the land. Tull was not the holder of the licence. All that he had was a personal right, under a contract, to have the licence transferred to him, subject to the discretion of the licensing justices. It was not a right as owner of the land, and he could not claim compensation in respect of that contract. It is said that the existence of the licence and the right to have it transferred enhances the value of the premises, but the acquiring authority are only interested in the land which they have acquired and not in the licence, which they have not acquired. *Belton* v. *London County Council*,[2] if rightly decided, is distinguishable and is not applicable since the passing of the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2. *Fitzwilliam (Earl)* v. *Commissioners of Inland Revenue*[3] is also distinguishable. [*Blundell* v. *Rex*,[4] *Roberts* v. *Coventry Corporation*[5] and *Northwood* v. *London County Council*[6] were also referred to.]

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[1] [1941] 2 K.B. 26, 42; 57 T.L.R. 404; [1941] 1 All E.R. 480.

J. Ramsay Willis Q.C. and *D. G. Widdicombe* for the claimants. On true principles it is clear that unless the claimants are held to be entitled in law to the compensation found by the Lands Tribunal, they would suffer injustice. There is a fallacy in the argument that the claimants are not entitled to recover the value of the premises with the licence because the appellants are only compulsorily acquiring the land and not the licence. It has never been suggested since the decision in *Belton* v. *London County Council*[7] that because the licence was not required by the acquiring authority it was to be ignored and its value disregarded. The compensation is fixed by reference to the date of the notice to treat. The notice to treat was given in 1951, and the premises were then licensed. Only slight reference has been made to the principle listed by Scott L.J. in *Horn* v. *Sunderland Corporation*,[8] that the compensation is to be assessed at the time when the notice to treat is given. Therefore it does not lie in the mouth of counsel for the acquiring authority to say that they did not acquire the licence. What they gave notice of was the compulsory acquisition of licensed premises.

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[2] (1893) 9 T.L.R. 232.

[3] [1914] A.C. 753.

[4] [1905] 1 K.B. 516, 521; 21 T.L.R. 143.

[5] [1947] 1 All E.R. 308; 63 T.L.R. 108.

[6] [1926] 2 K.B. 411; 42 T.L.R. 508.

[7] 9 T.L.R. 232.

[8] [1941] 2 K.B. 26, 48, 49.

The claimants' main contention is that if they are not entitled to recover £4,700 as the value of the land, then they ought to recover £800 for disturbance, giving credit for the value of the suspended licence: see the principles laid down by Scott L.J. in *Horn* v. *Sunderland Corporation*.[8] The Lands Tribunal correctly directed themselves to the main approach.

[Romer L.J. It is clear that Scott L.J. was saying that a man should receive compensation for the loss of his business even though the acquiring authority did not take it over.]

Day and Collins JJ. in *Belton* v. *London County Council*[9] said that it would be injustice if the authority acquired property at less than its fair market price. The fair market value is what the owner is entitled to have and his right is not affected by the Acquisition of Land (Assessment of Compensation) Act, 1919. That is what the Lands Tribunal have decided is the value at the date of the notice to treat. The same principle applies to licensed premises as to any other premises, but by inference drawn from the suspense procedure it is sought to distinguish licensed premises. The value of the suspended licence is not questioned, but the statement in Halsbury's Laws of England, 3rd ed., vol. 10, p. 165, it is submitted, is incorrect.

Wingate-Saul in reply. It is not disputed that the date of the notice to treat has to be considered, but that principle cannot be carried to the extent to which the claimants seek to carry it. An owner might get a decision by the tribunal for the full market value of the property and then get the licence transferred. It would then be too late to get back the extra compensation. *Horn* v. *Sunderland Corporation*[10] must be considered in relation to the purpose of that case. Much that Scott L.J. said was unnecessary for the decision.

Denning L.J. stated the facts and continued: In my judgment the claimants' contention is correct. Under the Defence Act of 1842 (which is the Act which authorizes this acquisition) compensation is to be paid for the lands, buildings and other hereditaments which are taken. There is no definition in that Act laying down the details of that compensation, but it has been well settled by the authorities that compensation is to be paid for the value of the land taken: it is to be paid for injurious affection to other lands, or for severance between the lands of the owner and other lands; and also compensation must be paid for disturbance. That has all been decided by the courts. In particular, before the Act of 1946 (which enabled a licence to be put into suspense) it was settled that compensation for licensed premises included the increase in value because the premises were licensed premises. True it is that a licence is personal to the holder, but, nevertheless, it adds a value to the premises because of the leverage that it gives to the owner in any application for another licence. See *Belton* v. *London County Council*[1] and *Fitzwilliam (Earl)* v. *Commissioners of Inland Revenue*.[2] I see no reason why those cases should not apply since 1946 as well as before. After all, the house which is being acquired is a licensed house and its value at the date of the notice to treat is to be found in the same way as before. The only difference is that previously the licence was destroyed by the compulsory acquisition, now it is suspended. In neither case did the acquiring authority acquire the licence. The claimants must give credit for the value of the suspended licence, because compensation is to be compensation for the loss sustained, no more and no less: see *Horn* v. *Sunderland Corporation*.[3] But that is all. The value of the suspended licence here was £200. The sum of compensation is £4,700, less £200: result £4,500.

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[8] [1941] 2 K.B. 26, 48, 49.

[9] 9 T.L.R. 232.

[10] [1941] 2 K.B. 26.

An alternative way of putting the case (which appealed to the tribunal) is to say: Take the suitability value without a licence, £3,900, and add to it compensation for disturbance because the owner had been disturbed in regard to the licence. The compensation for disturbance is the difference between the current value of the licence as agreed, £800, less the value of the licence in suspense, £200, making the compensation for disturbance £600. Adding £600 to the £3,900, it comes to the figure of £4,500. That is an alternative way of putting the case. But I prefer the way in which I first stated it.

We were referred to a passage in the 3rd edition of Halsbury's Laws of England, volume 10, p. 165, in which it is stated that, in consequence of the 1946 provisions (enabling a licence to be put into suspense), compensation for disturbance is not payable as the licence is not lost. It can be inferred from that statement that the editor thought that the provisions about suspense meant that compensation could not be given for the fact that the premises were licensed premises. I do not take that view.

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[1] (1893) 9 T.L.R. 232.

[2] [1914] A.C. 753.

[3] [1941] 2 K.B. 26.

It seems to me that the previous basis which existed before 1946 still holds good, subject to credit being given for the value of the suspended licence which is remaining in the hands of the owner.

I think that this decision of the Lands Tribunal was correct, and I would dismiss the appeal.

Romer L.J. I agree, and have very little to add. In *Horn* v. *Sunderland Corporation*,[3] to which my Lord has referred, Scott L.J. made some observations with regard to what "compensation" really means. He was there dealing with the Lands Clauses Act, 1845, but the remarks which he made are applicable to the present case. He said that that Act, so far as compensation is concerned, had two features, of which I need only mention the first. He said[4]: "The first is that what it "gives to the owner compelled to sell is compensation—the right "to be put, so far as money can do it, in the same position as "if his land had not been taken from him. In other words, he "gains the right to receive a money payment not less than the "loss imposed on him in the public interest, but, on the other "hand, no greater." On the footing of the requisitioning authority's contention it has been found as a fact by the Lands Tribunal, in the present case, that the claimants, Mr. Tull's executors, would have been £600 better off in respect of their interest in these licensed premises if the compulsory acquisition had never taken place. Prima facie, therefore, applying those observations of Scott L.J., it would seem that that £600 should be included in the compensation properly payable to the executors.

One way in which Mr. Wingate-Saul sought to meet that suggestion was by saying that in fact the Secretary of State for Air, the requisitioning authority, never acquired the licence in question at all: that the licence remained as it was before, but in a suspended state, and was put into the joint names of the lessor and lessees, and that therefore, as the Secretary of State did not acquire the licence, it can be disregarded in assessing the compensation. I think that that is a mistaken way of putting the matter, as is made plain, as I think, by Scott L.J. in his judgment in the same case, *Horn* v. *Sunderland Corporation*,[5] when he listed the principles on which compensation should be based. Under heading (5) he said this[5]: "He" (that is the claimant) "can recover no loss to which he is put by his decision to part

[3] [1941] 2 K.B. 26.

[4] Ibid. 42.

[5] [1941] 2 K.B. 42, 48, 49.

C. A.
1957

TULL'S PERSONAL REPRESENTATIVES v. SECRETARY OF STATE FOR AIR.

Romer L.J.

"with his land, but on a compulsory sale the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connexion with the business he has been carrying on, or the cost of reinstatement, because otherwise he will not be fully compensated." This passage shows, I think, quite clearly that if a man is carrying on a business and his premises are compulsorily bought, he is entitled not only to compensation in respect of the value of the premises, but to compensation for the loss of his business, the value of the goodwill; although, undoubtedly, the acquiring authority would not take it over themselves, they would not acquire the business or the goodwill.

Therefore, as I have said, that point on which Mr. Wingate-Saul relied cannot, I think, be supported—at all events, as in any way a decisive consideration. I agree with my Lord in thinking that this case is really covered by *Belton* v. *London County Council*,[6] and that the grounds of the decision in that case are entirely applicable to the present case. It seems to me that that decision (if any decision be required) really displaces the suggestion that the acquiring authority here are entitled to regard the claimants' reversion as being merely a reversion of premises suitable for licensed premises, but without regard to the fact that they were licensed premises; for in truth and in fact, and in law, what the claimants had was a reversionary interest in licensed premises, and it is in respect of that interest and no other that they are entitled, in my opinion, to compensation. I agree that the appeal should be dismissed.

SELLERS L.J. I agree.

Appeal dismissed with costs.

Solicitors: *The Treasury Solicitor; Vandercom, Stanton & Co.*

A. W. G.

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[6] 9 T.L.R. 232.

TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL.

1957
Jan. 24.

Lord Goddard C.J., Cassels and Lynskey JJ.

Rates and Rating—"Social welfare"—Friendly society—Convalescent home—Society providing benefits and assurance for members—Benefits provided on actuarial basis—Claim by society for rating relief—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

Friendly Society.

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of the rating relief provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a convalescent home and premises occupied by the society on the ground that it was a hereditament "occupied for the purposes of an organization . . . which is not "established or conducted for profit and whose main objects are "charitable or otherwise concerned with the advancement of . . . "social welfare" within the meaning of section 8 (1) (*a*). According to its rules the main objects of the society were "to provide "by voluntary contributions and deposits of the members," inter alia, relief during sickness, medical benefit, convalescent home benefit, and insuring money to be paid on the death of a member for members in the deposit and alternative benefit sections, and, for members in the assurance section, whole of life assurance payable at the death of a member, life endowment assurance, endowment assurance (payable to a member at the end of a term of years) and annuities in old age. The income of the society was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which the members were entitled in accordance with the rules, and the payment of the expenses of management. No member received any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. Under the rules governing the admission of members the committee of management, who could require a medical examination, might at their discretion admit persons of either sex as benefit members who satisfied the committee regarding "age, health, character and occupation" and a candidate was required to be "in good health, of sound constitu-"tion, with no hereditary family complaint and shall not be "following an occupation considered by the committee . . . to be "risky or injurious to health." There were also a number of rules and tables of premiums relating to assurance. The convalescent home in question was open without charge to members of the society whose subscriptions were not more than four months in arrear:—

Held (assuming that the society was not established or conducted for profit), that the society was not an organization whose

1957

National Deposit Friendly Society Trustees *v.* Skegness Urban District Council.

main objects were concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*) because its main objects were to carry on an insurance business, and the benefits which it provided were confined to those persons who became entitled to them by reason not only of having been made members but by having paid contributions in respect of those benefits. Accordingly, the society was not entitled to the relief provided by section 8 (2).

Per Lynskey J. Having regard to their context in section 8 (1) (*a*) some eleemosynary effect must be given to the words "social "welfare."

Appeal by case stated from Lincoln (Parts of Lindsey) Quarter Sessions.

By a notice of appeal given under section 4 of the Poor Relief Act, 1743, the appellants, the trustees of the National Deposit Friendly Society, appealed against a rate made on March 20, 1956, and a demand for payment issued thereon by the Skegness Urban District Council, the rating authority for the urban district of Skegness for the purposes of the Rating and Valuation Act, 1925, in respect of a hereditament, a convalescent home and premises at North Parade, Skegness, occupied by the society, on the ground that in making the demand the rating authority had failed to allow to the society the relief from liability provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.[1]

According to the rules of the society effective at the material time attached to and forming part of the case stated by quarter sessions, membership consisted of benefit and honorary members, and the objects of the society were, by rule 2 (1), "to provide "by voluntary contributions and deposits of the members for "(*a*) members in the deposit section (i) relief during sickness or "other infirmity, (ii) medical benefit, (iii) convalescent home "benefit, (iv) insuring money to be paid on the death of a

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[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organization ". . . which is not established or "conducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare; . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with "the date of the coming into force of "the first new valuation list . . . "the amount of rates chargeable "in respect of a hereditament to "which this section applies shall ". . . be limited as follows . . . "(*a*) for the first year of the new "list, the amount so chargeable shall "not exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year "before the new list came into "force;"

"member; (*b*) members in the alternative benefit section (i) relief "during sickness or other infirmity, (ii) convalescent home "benefit; (*c*) members in the assurance section (i) whole of life "assurance payable at the death of a member, (ii) life endow-"ment assurance . . . (iii) endowment assurance . . . (iv) annuities "in old age, (v) insuring money to be paid to a member on the "death of the member's husband or wife or on the duration for "a specified period of the life of the member's husband or wife ". . . (vi) insuring a sum of money to a member on the death "of any one of his parents . . ." By rule 2 (2): "The society "shall accumulate at interest for the use of any member of the "deposit or the alternative benefit sections any surplus of his "contributions . . . which may remain after providing for the "assurances in respect of which such contributions are paid. "(3) Each member of the deposit section shall pay a proportion "of his sickness, maternity and medical benefits or old age pay "out of his own deposit and, so long as he continues to do so, "his fellow members will provide the rest."

By rule 83, which governed the terms of admission of members: "(1) The committee of management who shall deter-"mine when a medical examination or evidence of age shall be "required may, at their discretion, admit as benefit members of "the society persons of either sex who . . . (*b*) satisfy the com-"mittee . . . regarding age, health, character and occupation. "(2) (*c*) A candidate shall be in good health, of sound constitu-"tion, with no hereditary family complaint and shall not be "following an occupation considered by the committee . . . to "be risky or injurious to health," and upon admission members were, at the discretion of the committee, placed into one of several classes, according to age, health and occupation. Rule 108 contained a number of provisions and tables of premiums in respect of whole of life, life endowment, and endowment assurance.

The following facts were found by quarter sessions. The appellant society was a friendly society founded in 1868 and first registered under the Friendly Societies Acts on August 27, 1872. The society carried on all the activities of their constitution and their policy in the investment of their accumulated funds was to choose investments which offered the highest return of income consistent with security of capital, no attempt being made to select investments with a view to capital accretion. The income of the society was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members were entitled in accordance with the rules of the society, and the payment of expenses. No member received any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. The convalescent home at Skegness was open to members of the society whose subscriptions were not more than four months in arrear in accordance with the rules and without charge. So far as the questions were questions of fact, quarter sessions found that the society was not established or conducted for profit and that apart from the welfare of individuals who subscribed, there was absent any element of advancement of the good of the community because the society's benefits were not available to anyone who was not a member.

The amount demanded by the rating authority by way of rates upon the convalescent home and premises in the year beginning April 1, 1956, was £1,983 4s.; the amount of rates (including any special rates) so charged in respect of the premises in the year ending March 31, 1956, was £786 10s.

It was contended by the society that they were an organization not established or conducted for profit, whose main objects were concerned with the advancement of social welfare and that the hereditament in question was one to which section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied.

It was contended by the rating authority that the society was not such an organization.

Quarter sessions was of the opinion that the society was an organization which was not established or conducted for profit but that, being concerned only with the provision of benefits for its own members, the society was not concerned with the advancement of social welfare within the meaning of section 8, and accordingly they dismissed the appeal.

The society appealed.

Percy Lamb Q.C. and *J. P. Widgery* for the appellant society. The main objects of the society are concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This is a matter of some importance to friendly societies generally, as other quarter sessions have come to a different conclusion in relation to other property belonging to a friendly society. The preamble to 33 Geo. 3, c. 54 (Rose's Act, 1793), describes the activities now known as "social welfare":

"Whereas the protection and encouragement of friendly societies "in this Kingdom, for raising, by voluntary subscription of the "members thereof, separate funds for the mutual relief and "maintenance of the said members in sickness, old age, and "infirmity, is likely to be attended with very beneficial effects, "by promoting the happiness of individuals, and at the same "time diminishing the public burdens." The appellant society was formed for the purpose of carrying out such activities and providing such benefits.

[LORD GODDARD C.J. If the benefits were available to anyone the position might be different, but the society is only concerned with the provision of benefits for its own members.]

The fact that the benefits are only available to the members of the society is immaterial. A trust which benefits only a section of the community may be a charitable trust. Membership of the society is in no way restricted or limited, and, further, the society benefits the whole of the body politic; if it did not provide convalescent homes, for example, it would be necessary for the State to provide more than it does. The use in section 8 (1) (*a*) of the words "or are otherwise concerned with," particularly in view of their juxtaposition to the words "the advancement of religion "[or] education"—objects which may not always be charitable—shows that Parliament intended to use a vague phrase to enlarge the narrow legal meaning which would otherwise have been placed on the word "charitable," and to extend the relief given by the section to bodies which for technical reasons are not strictly "charitable" in law. The society is such a body: although for technical reasons it is not a charity (*In re Clark's Trust*[2]), it is philanthropic in outlook and provides benefits to a large body of persons unrestricted by creed, family or age.

Reliance is placed on the definition of "social welfare activities" in section 16 of the Miners' Welfare Act, 1952, and on the purposes listed in Part II of the First Schedule to that Act, which, by virtue of section 3 (1) (*b*) and section 16, are "social "welfare activities"; those purposes are the same as the benefits provided by the society. The benefits therein set out are not available to the public at large but are confined to employees of the Coal Board or their dependants, so that they are not charitable purposes; their listing as "social welfare activities," therefore, shows that "social welfare" is intended to have a wider meaning than charitable. In construing the very wide words of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions)

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[2] (1875) 1 Ch.D. 497.

Act, 1955, the court should have regard to the meaning given by Parliament in 1952 to the words "social welfare." Since the purposes of the society are the same as those listed as "social "welfare activities" in the Act of 1952, it is submitted that they are equally "social welfare" within the meaning of section 8 of the Act of 1955.

[LORD GODDARD C.J. But the main object of the society is to provide insurance for its members.]

Its main objects are not to provide insurance as such but to set up an organization which any person seeking the benefits may join; the benefits are available to anyone who likes to become a member.

Sir Arthur Comyns Carr Q.C., *C. E. Scholefield* and *J. Deakin* for the rating authority. The society is not an organization whose main objects fall within section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. It is clear from its rules that it is conducted on the basis that the subscriptions are more than enough to pay for the benefits provided, and membership is subject to a candidate proving good health and satisfying the committee with regard to certain matters. The society is, therefore, an organization whose members pay for their own benefits and one to which the public have no right to be admitted; it is not a society for the benefit and help of others but is purely and simply a self-help society. Such a society is in no sense charitable: *Cunnack* v. *Edwards*.[3]

Where the words "or otherwise" are used in a statute, the ejusdem generis rule of construction must be applied: see *Monck* v. *Hilton*.[4] To be concerned with "social welfare" within the meaning of section 8 (1) (*a*), therefore, the objects of an organization, although they need not be charitable in the strict legal sense, must be charitable in a broad sense or resemble charitable objects. "Social" means "at large," and objects to qualify as being concerned with "social welfare" must benefit a wider circle of the community than the subscribers of a society. The wide insurance business carried on by the society shows that its main objects are neither charitable nor concerned with the advancement of social welfare.

The comparison with the provisions of the Miners' Welfare Act, 1952, does not assist the society. The characteristic feature distinguishing the benefits provided by that Act and the other modern "welfare" statutes from those provided by the society is that the money for the benefits provided for by the statutes

[3] [1896] 2 Ch. 679; 12 T.L.R. 614.

[4] (1877) 2 Ex.D. 268.

does not come from the beneficiaries themselves. Nor are those benefits confined to any particular class of persons. The benefits provided by the society may well be "welfare," but they are not "social welfare" within the meaning of section 8 (1) (*a*).

In any event, it is not conceded that the society is not established or conducted for profit.

Percy Lamb Q.C. replied.

LORD GODDARD C.J. This is a case stated by quarter sessions for Parts of Lindsey, which raises a point under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. That section, according to the marginal note, which is a convenient way of stating what the section is about, makes special "provisions "as to rates payable by charitable and other organizations." The provisions apply to "any hereditament occupied for the "purposes of an organization (whether corporate or unincorporate) "which is not established or conducted for profit and whose main "objects are charitable or are otherwise concerned with the "advancement of religion, education or social welfare."

The sole question in this case is whether the National Deposit Friendly Society, one of these very big friendly societies of I do not know how many hundred thousand, but a great number, of members, with many branches and many buildings, comes within those words.

The first observation I would make is this. If this society is entitled to have the benefit of these provisions, so must many others of the great friendly societies which exist. Speaking for myself, I should think it was remarkable, if Parliament had intended that societies which carry on the activities which this and kindred societies do should have special treatment with regard to rates, that it did not so provide in plain terms, in just the same way as in some of the taxing statutes; and, after all, rating statutes are taxing statutes in one sense. This Act does make special provisions for certain organizations, but, when one looks at the rules of this society and sees what are its activities, speaking for myself—I may be guilty of over-simplification—I cannot see how it can be said that its main object is social welfare. Its main object, as I see it, is to carry on an insurance business. It carries on just as good an insurance business as any insurance company, and, of course, it has the additional advantage that the Friendly Societies Acts apply so that the registrar can keep an eye upon it and its accounts.

One finds in the rules a fasciculae of rules starting with rule 83, which concerns the terms of admission of members, and members may be required to pass a medical examination before they are accepted. Rule 83 (2) (*c*) provides that "A candidate shall be "in good health, of sound constitution, with no hereditary family "complaint and shall not be following an occupation considered "by the committee of management to be risky or injurious to "health." This is not a body which anybody can join, but members may only be accepted if they fall within the rules and the society choose to accept them. It is perfectly true that the rule goes on to say: "A candidate unable to fulfil the conditions "contained in paragraph 2 (*c*) of this rule may be admitted in a "class lower than that to which his age entitles him," but the contributions which he must pay and the benefits which are given depend upon the person paying his contributions. What he is doing is insuring. Whereas the national health and insurance schemes set up under the National Health Service Act, 1946, and the National Insurance Acts, 1946, which apply to every man and woman in this country are no doubt a social service the ordinary life insurance or accident and sickness insurance which a person takes out with a company or an institution cannot in my opinion be said to be a social welfare service. I do not think that this friendly society can be said to have as its main object social welfare. Its main object is insurance, and one finds in rule 108 that there is an elaborate set of rules with regard to whole life insurance and endowment assurance. I think that this company is a company which is carrying on an insurance business; that is its main object, and I cannot see, therefore, that its main object can be social welfare.

To qualify for relief under section 8 an organization must also be carried on not for profit. We have not really considered that very closely, because there is a finding by quarter sessions that it is not carried on for profit. I confess that I find it somewhat difficult to understand how an insurance company can carry on its business at all if it does not make profits. However, we need not go into that, although Sir Arthur said that he was prepared to challenge that finding.

Quarter sessions put their finding that the society was not entitled to the benefit of the section on one short ground, that the main objects of the society were not concerned with the advancement of social welfare, being concerned only with the provision of benefits for their own members. That is one reason why it can be said that it is not concerned with social welfare, but, as I have said, I think that the main object of this society is to carry on an insurance business and to pay insurance benefits to those people who become entitled to them by reason of their not only having been made members, but by their having paid for those benefits.

For these reasons I think that quarter sessions came to a right decision, and that the society is not entitled to the benefit of this section.

CASSELS J. I agree, and I should like to add just one or two observations. This society, the National Deposit Friendly Society, has been in existence for about 89 years. By one of the exhibits, the annual report for the year ending December 31, 1955, one realizes that it must have been carrying on a very successful undertaking and, in order to support its activities in providing for the insurance and the number of benefits it does provide for its members, it has necessarily established itself in a sound financial position. The annual report demonstrates that for the year ending December 31, 1955, the society was in possession of not less than £21,000,000 worth of investments, and in so far as land is concerned it also possessed property, it may be some freehold and some not, to the value of more than £1,000,000, which seems to demonstrate that it is successfully conducted.

I agree that quarter sessions arrived at the proper conclusion, and this court is not to be moved by the fact that some other quarter sessions may have arrived at a different conclusion. The only difference between the two is that one has come here and the other has not. I agree that this appeal must be dismissed.

LYNSKEY J. I agree. I only desire to add this. When one looks at the context of the words which we have to construe, one finds that the hereditament is to be "occupied for the purposes "of an organization . . . which is not established or conducted "for profit and whose main objects are charitable or are other-"wise concerned with the advancement of religion, education "or social welfare." It seems to me, having regard to the use of the words "social welfare" in that context, coming after the words "are charitable or are otherwise concerned," that it rather looks as if some eleemosynary effect must be given to the words "social welfare." If a body only provides benefits to those who are subscribers and who pay for the benefits, and provides those benefits according to its rules upon an actuarial basis, it cannot

1957

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES v. SKEGNESS URBAN DISTRICT COUNCIL.

be said for one moment that its main purpose is an eleemosynary one in the business which it is carrying on.

In my view, although I am not prepared to define (I do not think any court could define) what is social welfare, this particular organization is not one whose main purpose is social welfare.

The result is that I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woolley, Tyler & Bury; Wrentmore & Son for Clerk to Skegness Urban District Council.*

J. F. L.

1957 *Feb.* 6.

Lord Goddard C.J.

WEST RIDING COUNTY COUNCIL v. HUDDERSFIELD CORPORATION.

Limitation of Action—Local authority—Money claims made following alteration of boundaries—Arbitration 16 *years after orders of Minister—Whether claims within provisions of Limitation Act and statute barred—Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 151—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1) (*d*), 27.

Orders were made by the Minister of Health in 1937 and 1938 pursuant to his powers under section 46 of the Local Government Act, 1929, by which parts of the area of the West Riding County Council were transferred to and incorporated into the Borough of Huddersfield. In January, 1953, the West Riding County Council sent to the Huddersfield Corporation for agreement claims for £214,516 and £44,273 in respect of the two orders, being the proposed adjustment called for by section 151 of the Local Government Act, 1933. The Huddersfield Corporation did not agree to the claims and an arbitrator was appointed. In their points of defence the corporation pleaded, inter alia, that the claims were statute barred as they did not arise wholly or in part within a period of six years before either the arbitration or the making of the claims. On a special case stated by the arbitrator:—

Held, that although section 151 of the Act of 1933 made provision for adjustments of other than a financial nature, the claims made in the present case were for specified sums of money and as such were within the ambit of section 2 (1) (*d*) of the Limitation Act, 1939, and thereby statute barred.

SPECIAL CASE stated by an arbitrator.

By the County of York West Riding Review Orders made by the Minister of Health in 1937 and 1938 pursuant to his powers

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

under section 46 of the Local Government Act, 1929, the boundaries of the County Borough of Huddersfield were extended to include areas which had previously been part of the administrative county of the West Riding of Yorkshire. By letters dated January 29, 1953, the West Riding County Council submitted for the agreement of the Huddersfield Corporation claims in the sums of £214,516 and £44,273, being in respect of the two orders for a financial adjustment made pursuant to section 151 of the Local Government Act, 1933.[1] With the letters were sent forms of claim and financial details of the sums claimed. Further correspondence ensued between the parties in relation to the claims and ultimately, by letters dated October 27, 1954, the Huddersfield Corporation refused to agree to either of the claims; and on September 9, 1955, the claims were referred to an arbitrator in accordance with the provisions of the Local Government Act, 1929, the Local Government Act, 1933, and the Arbitration Act, 1950. By their points of claim the West Riding County Council claimed a financial adjustment pursuant to section 151 of the Act of 1933. The Huddersfield Corporation in their points of defence alleged that the rights claimed by the county council did not arise within a period of six years in whole or in part before the arbitration or before the making of the claims, and such rights (if any) were therefore barred by virtue of section 2 (1) (*d*) of the Limitation Act, 1939. At the request of the parties the arbitrator submitted a special case for the decision of the court before proceeding with the determination of the issues. The question was whether in the circumstances the claims or either of them were or was in whole or in part barred by virtue of the provisions of the Limitation Act, 1939.

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[1] Local Government Act, 1933, s. 151: "(1) Any public bodies "affected by any alteration of areas "or authorities made by an order "under this Part of this Act may "from time to time make agreements "for the purpose of adjusting any "property, income, debts, liabilities "and expenses (so far as affected by "the alteration) of, and any financial "relations between, the parties to the "agreement. (2) The agreement may "provide for the transfer or retention "of any property, debts, and liabilities, with or without any conditions, "and for the joint use of any property, and for the transfer of any "functions, and for payment by either "party to the agreement in respect "of property, debts, functions, and "liabilities so transferred or retained, "or of such joint user, and in respect "of the remuneration or compensation "payable to any officer or person, and "that either by way of a capital sum "or of a terminable annuity for a "period not exceeding that allowed "by the Minister. (3) In default of "an agreement as to any matter requiring adjustment, such adjustment "shall be referred to the arbitration "of a single arbitrator agreed upon "by the parties, or in default of "agreement appointed by the Minister, and the award of the arbitrator "may provide for any matter for "which an agreement might have "provided. . . ."

Sir Hartley Shawcross Q.C. and *I. S. Warren* for West Riding County Council. If the Limitation Act, 1939, applies, the county council, to succeed, must show that the right to adjustment accrued not at the time of the making of the orders but within the limitation period. There are two important features of section 151 of the Local Government Act, 1933, first, that the power is given to local authorities to enter into agreements from time to time, not necessarily once and for all, and there is no time limit within which such agreements must be entered. These agreements may or may not result in the payment of money from one to the other, for sometimes an authority transferring part of its area to another may be relieved of liabilities and have no claim. There may be adjustments of functions or ownership of property without any money passing at all. Secondly, the matter can be referred to an arbitrator only in default of agreement between the authorities. The present type of proceedings is not within the contemplation of the provisions of the Limitation Act, 1939, but if it is, the submission is that the cause of action arose within six years of the making of the claim.

[Lord Goddard C.J. Do you say that there is no limitation at all on such claims?]

Yes, because the Limitation Act is not meant to apply to such cases of local authority administration at all. The Limitation Act was not pleaded in *Monmouth County Council* v. *Newport Corporation*.[2] Even if it does apply, the right accrued only when the parties failed to agree in October, 1954. Mere neglect by either party to take steps to procure an adjustment does not amount to failure to agree.

Section 2 (1) (*d*) of the Limitation Act, 1939, raises four questions: (i) what is the meaning of "cause of action"? (ii) what is the county council's cause of action? (iii) when did it arise? (iv) is it a claim for the recovery of a sum of money? As to (i), the popular view is that it is the act of the defendant which gives the plaintiff his right to claim, but in law it accrues when all the facts exist which it is necessary to prove as part of a case: *Bradford Old Bank* v. *Sutcliffe*, *per* Pickford L.J.[3] (ii) The cause of action, if it be a cause of action, can follow only if there is a public body, affected by an order for the alteration of its area, which has property, income, debts, liabilities and expenses requiring adjustment. (iii) The cause arises when there is default of agreement, that is, the terminus a quo.

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[2] (1946) 175 L.T. 293.

[3] [1918] 2 K.B. 833, 840; 34 T.L.R. 299.

[LORD GODDARD C.J. Default of agreement simply means no agreement.]

No. If parties go to sleep, and do not put their minds to the matter at all, there is no default. There is no default if no active steps are taken to agree. (iv) The claim originally put forward was a monetary one, but that does not affect the matter. The question is whether the language of section 151 makes the cause of action one for the recovery of money. There is nothing in the statute which gives a specific right of recovery of a sum of money.

[LORD GODDARD C.J. In your points of claim you claim a financial adjustment.]

Yes, but the Huddersfield Corporation deny that any sums should be paid and there is no evidence that there would have been any such award. This is not the same as an ordinary civil claim for damages. The arbitrator might substitute altered functions instead of a money award. The question is not whether the claim sounds in money but whether the arbitrator's award must sound in money. " Financial adjustment " is used in the points of claim as a term of art. It is a claim for adjustment and an award of a sum of money may be an incidental result. It must also be considered whether section 2 (1) (*d*) of the Act of 1939 applies to all adjustments between local authorities in this sphere of public administration. It was held not to apply to proceedings under the Workmen's Compensation Acts: *Leivers* v. *Barber, Walker & Co.*[4]

[LORD GODDARD C.J. I would at present agree that the Limitation Act does not apply to a transfer of functions, but in your points of claim you ask for money.]

The county council are not bound by their points of claim. On section 2 (1) (*d*) the submissions are in short, first, that it is not applicable to the present claim at all, and, secondly, that this is not a monetary claim. [Reference was also made to *Jarvis* v. *Surrey County Council*[5] and *In re St. Thomas Rural District Council and Heavitree Urban District Council.*[6]]

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[4] [1943] K.B. 385; 59 T.L.R. 195; [1943] 1 All E.R. 386.

[5] [1925] 1 K.B. 554; 41 T.L.R. 228.

[6] (1902) 86 L.T. 153.

1957

West Riding County Council v. Huddersfield Corporation.

Harold Willis Q.C. and *Eric Blain* for Huddersfield Corporation. The wording of section 2 (1) (*d*) is clear and there is nothing which precludes the present case from coming within its provisions.

[They were stopped.]

Lord Goddard C.J. This is a special case stated by the learned arbitrator who was appointed pursuant to section 151 (3) of the Local Government Act, 1933. That is an Act which concerns the financial adjustment between two local authorities where there has been an alteration of boundaries, so that one local authority takes any part of the area of another local authority. I think one can conveniently put it in that way. In this matter it appears that under an order of 1937 and another order of 1938 part of the West Riding area was transferred to and incorporated in the Borough of Huddersfield, and that no doubt led to many financial adjustments and other matters.

[His Lordship read section 151 (1), (2) and (3) of the Act of 1933 and continued:] There follow several provisions for the payment of moneys found due by the arbitrator. I have no doubt that there are matters which may not involve the payment of money. It may be that some functions can be transferred without having to make financial provision with regard to them; but it is quite obvious to me from the whole of the section, including the following subsections, that the statute clearly is contemplating that in most cases at any rate there will be payments of money.

What has happened in this case is simply this. On January 29, 1953, the treasurer of the West Riding County Council wrote to the town clerk of the Huddersfield Borough Council as follows: "I enclose the claim, with supporting financial tables, of the "county council against the corporation of the city . . . in respect "of the areas added . . . on April 1, 1937, under the provisions "of the above-named Review Order. The claim is marked "'Without prejudice and subject to revision,' and if any of the "items are not quite clear to you, I shall be pleased to explain "them if we can arrange an appointment. The question of "orders for continuing county expenditure remains to be con-"sidered." That was sending in a money claim—there is no question about that—for £214,516, and it was followed by another letter submitting a claim for £44,273. These letters were accompanied by most elaborate and lengthy accounts and figures showing how these amounts were made up. It seems to me that one would be shutting one's eyes to the truth of the matter if one did not regard this as being simply a claim by the West Riding County Council on the Huddersfield Borough County Council for roughly £260,000: that is what it was, taking the two claims together.

As there was no agreement between the parties, an arbitrator was appointed. By the terms of his appointment he was required to adjudicate upon " the adjustments in respect of the matters as " to which " the West Riding County Council " have submitted " the aforesaid claims," and the " aforesaid claims " were money claims. Points of claim were prepared, paragraph 3 of which recites: " On January 29, 1953, by letter dated that day, the " claimants submitted for the agreement of the respondents two " proposals for the purpose of adjusting property income debts " liabilities and expenses of the claimants and the respondents " in so far as the same were affected by the two alterations of " area aforesaid respectively and financial relations between the " claimants and the respondents. (4) By letters dated October 27, " 1954, the respondents refused to agree to the adjustments pro- " posed in respect of either of the aforesaid alterations of area. " And the claimants claim: A financial adjustment pursuant to " section 151."

A defence was put in; it refers to the letters and in paragraph 8 it raises the plea of the Statute of Limitations in this form: " The claimants' alleged rights herein did not arise in " whole or in part within a period of six years before this arbitra- " tion or before the making of either of the aforesaid claims and " such rights (if any) were and are barred by virtue of the " provisions of the Limitation Act, 1939."

On that the arbitrator, obviously regarding, and I think quite rightly regarding, the arbitration as being one in which he was being asked to make an award in favour of the West Riding County Council for £260,000 or such less sum no doubt as he might find, so that it was essentially a money claim, and finding that a plea of statutory limitation was on the record, thought that the right course to adopt was (and I suppose he was invited to take it by the parties) to take the opinion of the court by way of special case as to whether the Limitation Act applied.

The Limitation Act, 1939, by section 2 (1), provides: " The " following actions shall not be brought after the expiration of " six years from the date on which the cause of action accrued, " that is to say:—. . . (*d*) actions to recover any sum recoverable " by virtue of any enactment, other than a penalty or forfeiture " or sum by way of penalty or forfeiture." Section 27 provides:

"(1) This Act and any other enactment relating to the limitation "of actions shall apply to arbitrations as they apply to actions "in the High Court. . . ." By section 27 (6): "This section "shall apply to an arbitration under an Act of Parliament as "well as to an arbitration pursuant to an arbitration agreement, "and subsections (3) and (4) thereof shall have effect, in relation "to an arbitration under an Act, as if for the references to the "arbitration agreement there were substituted references to "such of the provisions of the Act or of any order, scheme, "rules, regulations, or byelaws made thereunder as relate to the "arbitration."

In my opinion this is a money claim and the arbitration is one to recover a sum recoverable by virtue of an enactment. Section 151 of the Local Government Act provides for this adjustment. If the local authority which loses part of its area to another corporation or body can show that it has suffered financial loss within the meaning of that section, a loss which has to be adjusted, then it has a claim for the money. It seems to me that that is the scheme of the Act. I think that the arbitration which was held here was an arbitration consequent upon the West Riding County Council's claim that it ought to be paid money in respect of the transfer of part of its area to another body. That transfer, however, took place more than six years ago.

Sir Hartley Shawcross, on behalf of the West Riding County Council, has submitted that the cause of the arbitration, which would be equivalent for this purpose to a cause of action, did not arise until the parties failed to agree. I cannot think in the circumstances that that is right. There is no obligation on the parties to come to an agreement. The money was demanded by the county council more than six years after the transfer had taken place and more than six years, therefore, after the time by which they might have demanded or required the money. Then the matter having been left and no claim having been made to the money, suddenly a claim comes forward which nobody was under any obligation, so far as the statute is concerned, to discuss or to attempt to agree. The Huddersfield Borough Council simply said: "We do not recognize that claim." Thereupon an arbitrator was appointed. What he was appointed to do was to make a financial adjustment arising out of what happened many years ago. In my opinion this is really, when the realities of the transaction are looked at and the documents to which I have been referred are considered, simply an action to recover a sum of money by virtue of the provisions of section 151 of the Local Government Act, 1933. Therefore, in my judgment, the answer to the arbitrator's question is that the claim is barred by the statute, and I so declare.

Declaration accordingly.

Solicitors: *Cummings, Marchant & Ashton for Bernard Kenyon, Wakefield; Sharpe, Pritchard & Co. for Harry Bann, Huddersfield.*

REGINA *v.* LOBELL.

C. C. A.

1957
Mar. 4, 11.

Lord Goddard C.J., Cassels and Gorman JJ.

Criminal Law—Self-defence—Onus of proof—Onus of establishing plea of self-defence not on accused—Unlawful wounding.
Criminal Law—Wounding—Onus of proof—Self-defence.
Burden of Proof—Criminal case—Burden on prosecution throughout—Self-defence—Wounding.

In cases where the defence of self-defence or justification is raised the onus of proof of the guilt of the accused remains throughout on the prosecution. That does not mean that the prosecution must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or, indeed, need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, but there is a difference between leading evidence which would enable a jury to find an issue in favour of the accused and in putting the onus upon him. The jury must come to a verdict on the whole of the evidence that has been laid before them: if on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty.

Where, therefore, at the trial of the appellant on a charge of wounding with intent to do grievous bodily harm, the appellant set up a defence of self-defence, which there was evidence to support, and the trial judge directed the jury that it was for the defence to establish that plea to their satisfaction:—

Held, that a proper direction would have been to tell the jury that the burden of establishing guilt was on the prosecution throughout but that they must also consider the evidence for the defence which might either convince them of the innocence of the accused or cause them to doubt, in which case he was entitled to an acquittal, or which might, as it sometimes did, strengthen the case

C. C. A.
1957

REGINA
v.
LOBELL.

for the prosecution; and that, as the court did not feel satisfied that if the correct direction had been given the jury would have been sure to have convicted, the conviction must be quashed.

Chan Kau v. *The Queen* [1955] A.C. 206; [1955] 1 All E.R. 266 applied.

Reg. v. *Smith* (1837) 8 C. & P. 160 disapproved.

APPEAL against conviction.

The appellant, Harry Lazarus Lobell, was charged at Manchester Crown Court with wounding with intent to do grievous bodily harm. There had been bad blood and enmity between the appellant, who was a wholesale butcher and had a stall in a meat market, and the complainant, one Evans. There was evidence of threats which had been uttered by Evans against the appellant; he had on a previous occasion, with a knife in his hand, said he would kill Evans, who had retorted that if the appellant moved his arm he would break it. On the day of the wounding alleged in the indictment it was said that Evans approached the appellant uttering threats, that the latter then threw a brick at Evans who, however, continued to advance towards him in a threatening manner, whereupon the appellant picked up a knife, which he said he had brought for his protection, and stabbed him. He then drove off to the police station and said that he had stabbed a man in self-defence.

At the trial the sole defence set up by the appellant was that in inflicting the wound he was acting in self-defence. Jones J., summing up, directed the jury, and several times stressed, that it was for the defence to establish that plea to their satisfaction. The jury convicted the appellant and he appealed on the grounds that the judge's direction that the burden of proving this defence was on the accused was erroneous, and also that the judge did not direct the jury that the degree of proof required from the defence was of a less degree than that required from the prosecution.

J. R. D. Crichton Q.C. and *I. R. Taylor* for the appellant. The burden of proof is never placed upon an accused person except in cases of insanity or where a statute expressly provides, and it was therefore a misdirection to tell the jury that it was for the defence to establish to their satisfaction the plea of self-defence. Where there is a plea of justification the onus is on the Crown throughout: *Chan Kau* v. *The Queen*.[1] The judge apparently followed the passage in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., pp. 941, 942,[2] where the summing-up in *Reg.* v. *Smith*[3] is quoted; that passage was disapproved in *Chan Kau* v. *The Queen*,[4] where Lord Tucker[5] said that it needed modification in the light of modern decisions.

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[1] [1955] A.C. 206; [1955] 1 All E.R. 266.

[CASSELS J. referred to *Woolmington* v. *Director of Public Prosecutions*.[6]]

It is not contended that it does not lie upon a defendant setting up self-defence to put forward evidence upon which the jury can find that he was acting in self-defence, but it is for the Crown to overcome that evidence and to establish their case over and above the plea of self-defence.

At no time did the judge direct the jury that the standard of proof required of the defence is not as high as that required of the prosecution. [Reference was made to *Rex* v. *Haddy*.[7]] In view of that omission, and the clear misdirection, it is submitted that the conviction cannot stand.

Sir Noel Goldie Q.C. and *Donald Summerfield* for the Crown. In *Chan Kau* v. *The Queen*[8] it was considered that there had been a misdirection as to the onus of proof in regard to self-defence, but the appeal was not allowed on that ground, but on the ground that a plea of provocation had been improperly withdrawn from the jury. If there is a misdirection here, it is submitted that it does not go to the root of the matter and that the test to be applied is that in *Lejzor Teper* v. *The Queen*[9] as modified and applied in *Chan Kau* v. *The Queen*.[10] There was ample evidence on which the jury could have come to their decision and it is submitted that this is a case in which the court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

LORD GODDARD C.J. The court will quash the conviction, but as the case raises a question of considerable importance we will put our judgment into writing and deliver it at a later date.

March 11. LORD GODDARD C.J., reading the judgment of the court, stated the facts and the grounds of appeal as set out above and continued: It is unnecessary to set out verbatim the passages in the judge's full and careful summing-up which have been criticized by counsel for the appellant, because there is no doubt, and the prosecution has not contended otherwise, that he directed the jury that it was for the defence to establish to their satisfaction his plea of self-defence. The onus was clearly put in the summing-up on the defendant. There is no doubt that in so doing the judge had the support of *Reg.* v. *Smith*[1] where Bosanquet J.,[2] apparently with the approval of Bolland B. and Coltman J., charged the jury that before a person can avail himself of this defence he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. In that case the judge said that the accused would be justified. He no doubt had in mind the provisions of 9 Geo. 4, c. 31, s. 10, now replaced and re-enacted by section 7 of the Offences against the Person Act, 1861, which enacts that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony. This passage from the summing-up has for many years appeared in Archbold's Criminal Pleading and Practice as the proper direction to be given in such cases and certainly puts the onus of establishing a defence of killing se defendendo on the accused. It is a defence of justification, or, to put it in terms of pleading, a confession and avoidance. In civil cases this plea is always to be proved by the party setting it up; and it is perhaps not altogether easy to see why it should not be so in a criminal case, more especially as when self-defence is set up the facts must often be known only to the defendant who relies upon it.

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[2] Amended in Cumulative Supplement.

[3] (1837) 8 C. & P. 160.

[4] [1955] A.C. 206.

[5] Ibid. 211, 212.

[6] [1935] A.C. 462; 51 T.L.R. 446.

[7] [1944] K.B. 442; 60 T.L.R. 253; [1944] 1 All E.R. 319.

[8] [1955] A.C. 206.

[9] [1952] A.C. 480, 492; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

[10] [1955] A.C. 206, 214.

But in the opinion of the court the cases of *Woolmington* v. *Director of Public Prosecutions*[3] and *Mancini* v. *Director of Public Prosecutions*[4] establish that in murder or manslaughter the rule that the onus is on the prosecution permits of no exception except as to proof of insanity. In the recent case of *Chan Kau* v. *The Queen*[5] this was stated in terms by Lord Tucker,[6] who referred to

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[1] (1837) 8 C. & P. 160.

[2] Ibid. 162.

[3] [1935] A.C. 462; 51 T.L.R. 446.

[4] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[5] [1955] A.C. 206; [1955] 1 All E.R. 266.

[6] [1955] A.C. 206, 211, 212.

Reg. v. *Smith* [7] and said that the passage from the summing-up quoted in Archbold clearly needed some modification in the light of modern decisions. It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or indeed need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but none the less the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence. Had the judge in the present case gone on to say that it was not for the accused to establish his plea with the same degree of certainty as is necessary to establish a case for the prosecution it might have been that we should have had to consider whether this was a case for the application of the proviso. There was certainly here material on which a jury might have found self-defence. But that it was the duty of the accused to satisfy them on this point was on several occasions stressed in the summing-up and we do not feel by any means satisfied that if what we now hold was the correct direction had been given the jury would be sure to have convicted. For these reasons we quashed the conviction at the close of the argument.

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[7] 8 C. & P. 160.

Appeal allowed.

Solicitors: *A. E. M. West & Co., Manchester; Sharpe, Pritchard & Co. for P. B. Dingle, Manchester.*

J. F. L.

C. C. A.
1957
Feb. 11, 15.

Lord Goddard C.J., Cassels and Hinchcliffe JJ.

REGINA *v.* SHARP.
REGINA *v.* JOHNSON.

Criminal Law—Affray—Terror of subject—No evidence that any person actually put in terror—Whether necessary where circumstances such as to frighten or intimidate reasonable people—Defence of self-defence—Whether material to charge of affray.

Justices—Peace—Recognizances to keep—Jurisdiction—Her Majesty's judges as justices—Justices of the Peace Act, 1361 (34 *Edw.* 3, *c.* 1).

Criminal Law—Court of Criminal Appeal—Jurisdiction—Justices, as —Recognizances to keep peace—Justices of the Peace Act, 1361 (34 *Edw.* 3, *c.* 1).

Since the Indictments Act, 1913, the mere allegation of an affray imports terror and disturbance, but that averment means no more than that there has been a real disturbance of the peace by two persons fighting in public or endeavouring, by a display of force, though without necessarily using actual violence, to overawe the public; and it is open to a jury to find that the circumstances amounted to an affray although no evidence is given by any person that he was actually put in terror.

At the trial of two young men jointly indicted for making an affray there was evidence that they had fought to exhaustion in a public street, each injuring the other, and watched by a large crowd of people from the opposite side of the street. Each man claimed to have fought in self-defence. There was no evidence from any person that he was actually put in terror. The recorder overruled defence submissions that in the absence of such evidence the charge of affray could not stand and directed the jury (1) to consider whether the circumstances were such as to frighten or intimidate reasonable people and (2) that the defence of self-defence relied upon by each defendant was immaterial to the charge. The jury convicted:—

Held, (1) that there was evidence on which the jury could find that the appellants were guilty of an affray and on that matter the recorder's direction was correct.

(2) That there was not an affray if one of two persons fighting in the street was only defending himself against attack, and therefore the defence of self-defence was material and raised questions for the jury. The recorder's direction on that matter, accordingly, was wrong and the convictions must be quashed.

Field v. *Receiver of Metropolitan Police* [1907] 2 K.B. 853; 23 T.L.R. 736 considered.

(3) But that the court, as Her Majesty's judges, were justices of the peace for every county and had jurisdiction to order the appellants to enter into recognizances and give security to keep the peace under the Justices of the Peace Act, 1361—which they (Her Majesty's judges sitting in the court) did.

APPEALS against conviction.

The appellants, Ronald Edward Sharp and Michael Patrick Johnson, were convicted on December 6, 1956, before the Recorder of London on the first count of an indictment which charged them jointly with having, on September 27, 1956, in a certain public street and highway, to wit, the Highway, Stepney, unlawfully fought and made an affray. Three other charges, one against Sharp of wounding Johnson with intent to cause grievous bodily harm, and two against Johnson of causing grievous bodily harm to Sharp and of assaulting him occasioning him actual bodily harm, were not left to the jury.

The evidence was that on September 27, 1956, shortly after 12 noon a police constable found a large crowd assembled at the junction of Wapping Lane and Highway, Stepney, watching a fight between the two appellants who were fighting on the opposite pavement. They were still aiming blows at each other with their fists but appeared to be exhausted; their faces and clothes were covered with blood. Johnson had a severe cut on the head. The officer separated the appellants and Johnson then gave him a razor with which he said Sharp had cut him and which he (Johnson) had taken from him. The officer went after Sharp and stopped him and found that part of his left ear had been torn or bitten off; two of his upper teeth had been knocked out and he had a black eye and a cut lip. Each appellant made statements: Johnson admitted that he had stopped Sharp, with whom he had had a previous quarrel, and said: "Now, what "about it, now you are on your own," and that then Sharp attacked him with the razor. He admitted that he had bitten

Sharp. The latter, who was to some extent disabled by poliomyelitis, admitted that he had the razor but said that he only used it in self-defence when attacked by Johnson.

At the trial, counsel for the appellants moved to quash the count of making an affray on the ground that the evidence did not support the charge because no evidence was given that any person was put in terror. The recorder overruled the submissions and ruled and directed the jury that under the circumstances which prevailed today it was right and proper that they should consider, in the absence of any particular person who said that he or she was made afraid, whether or not the whole circumstances of the fight and its nature, including the place, were of such a character as might very well intimidate or frighten reasonable people. He also directed that it did not matter, for the purpose of the charge of making an affray, which of the appellants started the fight, and that it was immaterial whether what was done by either of them was done in self-defence.

Both appellants, on conviction, were sentenced to 12 months' imprisonment. Each appealed against conviction on a certificate given by the recorder (1) on the question whether, in the absence of any direct evidence that anyone was put in terror, it was sufficient if there was proof that the fight was between two persons in a public place and of such a nature as might well intimidate or frighten reasonable people; (2) on the ground that the recorder had misdirected the jury in directing them that the defence of self-defence was immaterial.

Edward Clarke for the appellant Sharp. To constitute an affray there must be a fight between two or more persons in a public place "to the terror of the Sovereign's subjects": see the definition in Halsbury's Laws of England, 3rd ed., vol. 10, p. 584. The phrase "to the terror of the Sovereign's subjects" does not appear to have been considered in any reported case, but it is submitted that in affray, as in riot, where the same element is necessary, there must be evidence to show that some person was actually frightened. It is not sufficient to show that the circumstances were such as to frighten people. That was decided in relation to riot in *Field* v. *Receiver of Metropolitan Police*,[1] where Phillimore J. set out the essential elements of that offence.[2] The fifth element so set out was "force or violence displayed in such

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[1] [1907] 2 K.B. 853; 23 T.L.R. 736.

[2] [1907] 2 K.B. 853, 860.

"a manner as to alarm at least one person of reasonable firmness "or courage." That was strictly applied by Pritchard J. in *Munday* v. *Metropolitan Police District Receiver.*[3] There is no case where there has been held to be a riot unless that has been proved. What applies to riot also applies to affray, and therefore the recorder's summing-up to the effect that it was unnecessary to prove that at least one person was put in fear was erroneous.

[LORD GODDARD C.J. If it is necessary to prove that at least one person was put in fear, how was it that duellists were always charged with affray, yet duels took place generally only in the presence of seconds and surgeons who would not have been frightened?]

[Stephen's History of the Criminal Law (1883), vol. 3, p. 100; Spedding's Letters and Life of Francis Bacon (1868), vol. 4, p. 397, and Holdsworth's History of English Law (1945), 3rd ed., vol. 5, p. 200, were referred to.]

There is no reported case where duellists have been convicted of affray. The word "affray" is not a term of art. It is used as being synonymous with "fight." By the nineteenth century it had become an absolutely essential ingredient of affray that the fight should be in terrorem populi. Even if the recorder's direction was right in law it could not possibly be said on the facts of this case that anybody was or might have been frightened.

As to the second ground of appeal, the only defence put forward by Sharp was that he acted in self-defence and used the razor because he was crippled by polio and could not run away when attacked by Johnson. That defence should not have been withdrawn from the jury. The recorder's direction that self-defence was immaterial to a charge of affray was a fatal misdirection in law. The appeal should be allowed.

Donald Farquharson for Johnson. If the proposition contended for by the Crown is correct, the decision in *Field* v. *Receiver of Metropolitan Police*[4] must be wrong. The words used by Phillimore J.[5] in that case to define the fifth element necessary to constitute riot were based on *Reg.* v. *Langford.*[6] In that case there was held to be a riot where the son-in-law of an old man in possession of a house came with two other men and started to demolish the house while the old man was in it. The jury were directed that if any one of Her Majesty's subjects were terrified, that was sufficient terror and alarm to constitute that part of riot. On the facts of the case it is understandable why the judge gave that direction. There are other authorities in relation to riot which show that there must be evidence that at least one person was put in fear: see *Ford* v. *Receiver of Metropolitan Police*[7] and *Munday* v. *Receiver of Metropolitan Police*.[8] In *Pitchers* v. *Surrey County Council*,[9] where it was held that soldiers had rioted where a disturbance took place within the confines of a military camp, there was a finding by Swift J.[10] that more force and violence had been used than was sufficient to alarm one person of reasonable firmness and courage. That finding was approved by Lord Sterndale M.R. in the Court of Appeal.[11]

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[3] (1949) 65 T.L.R. 145; [1949] 1 All E.R. 337.

[4] [1907] 2 K.B. 853.

[5] Ibid. 860.

[6] (1842) Car. & M. 602.

[LORD GODDARD C.J. The question is whether some person must be called to say "I was alarmed" or whether it is sufficient to show that there was conduct which could have caused alarm.]

The essence of both riot and affray is public fear. If the public is not put in fear, then neither offence is established: see *Rex* v. *Smith*,[12] where a shot was fired on a public highway but it was held that there was no riot as no member of the public was on the highway at the time so that no member of the public could have been put in fear. See also *Reg.* v. *Hunt*.[13] Even if the law implies fear, which it is submitted is not the case, there could have been no such implication in the present case because the people watching the fight between the two appellants were interested in it and not frightened by it.

[LORD GODDARD C.J. Is not the test whether the fight taking place is a spectacle which is calculated to alarm people of ordinary firmness and courage? Prize-fighting is a terrifying spectacle. Affray was regarded at common law as a nuisance, but people who fight in public are breaking the Queen's peace, which has always been a high misdemeanor.]

If the object of the offence was to stop a breach of the peace it would not have lain dormant for so long. The only author who deals with affray is Hawkins in his Pleas of the Crown (1824), 8th ed., vol. 1, chap. 28, p. 488. It is not dealt with in Hale's Pleas of the Crown (1778), East's Pleas of the Crown (1803) or Foster's Crown Law (1762).

As to the second ground of appeal, if the recorder's direction was correct it means that a person who is attacked must stand

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[7] [1921] 2 K.B. 344; 37 T.L.R. 467.

[8] 65 T.L.R. 145.

[9] [1923] 2 K.B. 57; 39 T.L.R. 233.

[10] [1923] 2 K.B. 57, 61.

[11] Ibid. 71.

[12] [1914] 2 I.R. 190.

[13] (1845) 1 Cox C.C. 177.

and take no part in the fight because if he does so he can be indicted for affray. Johnson's only defence was that he was forced to fight because he saw Sharp pull out a razor. There is ground for complaint if the only defence put forward is withdrawn from the jury. Self-defence is a natural right which cannot be taken away by the common law: see Foster's Crown Law (1762), p. 273; *Reg.* v. *Knock.*[14]

A. S. Morton for the Crown. The recorder's direction as to the nature of affray was correct. A fight which takes place in the presence of the Sovereign's subjects is an affray because it is naturally apt to frighten them. It is not necessary to prove that any person was actually frightened. An examination of the authorities shows that the definition of affray given by the modern authorities stems from the Third Part of Coke's Institutes of the Laws of England (1809), chap. 72, p. 157. According to Coke, "single combat between any of the King's subjects . . . for "private malice, or displeasure is prohibited by the laws of this "realm: . . . but albeit upon the single combat no death ensue "nor blood drawn, yet the very combat for revenge is an affray, "and a great breach of the king's peace, an affright and terrour to "the king's subjects and is to be punished by fine and imprison-"ment. . . . An affray is a publique offence to the terrour of the "king's subjects, and is an English word, and so called, because "it affrighteth and maketh men affraid, . . ." In Hawkins' Pleas of the Crown (1824), 8th ed., vol. 1, chap. 28, p. 487, it is said that the word "affray" is derived from the French word "effraier," to terrify, and that, in a legal sense, it is taken for a public offence to the terror of the people. According to Hawkins, an assault which takes place in a private place does not amount to an affray because "it cannot be said to be" to the terror of the people. The inference is that it ought to be. The definition in Blackstone's Commentaries of the Laws of England (1778), 8th ed., book IV, chap. 11, p. 145, is based on Hawkins. [Reference was also made to Burn's Justice of the Peace (1869), vol. 1, p. 57.] It is clear that to both Coke and Hawkins the nature of affray was that it tended to frighten people.

There is no case where it has been held that affirmative evidence is necessary to show that a person or persons has or have been frightened. If there were such a requirement it was ignored in *Reg.* v. *Hunt*,[15] where the accused were charged with both riot and affray and acquitted on affray on the ground that the place where the fight took place was not a public place. In

[14] (1877) 14 Cox C.C. 1.

[15] 1 Cox C.C. 177.

Rex v. *Connor*[16] there was shooting in a public house and the appellant with two other men was charged with wounding another. Lord Alverstone C.J. referred to the incident throughout as an affray although there was no evidence in the case as reported to show that anyone other than the protagonists was in the public house when the incident took place. Even in the riot cases evidence that a person or persons had in fact been frightened used not to be required: see *Rex* v. *Billingham*.[17] That requirement stems from *Langford's* case,[18] which was decided on very peculiar facts: it is hardly too much to say that if the jury had not there found that the old man was frightened there could not have been a riot. Phillimore J.'s decision in *Field* v. *Receiver of Metropolitan Police*[19] was based on that case. On the ancient authorities it may be wrong. In any event it is submitted that in *Field's* case[19] the court did not say that there must be evidence that at least one person was frightened. The words used show that there must be a tendency to alarm one person of reasonable firmness and courage. That submission is fortified by Russell on Crime (1950), 10th ed., vol. 1, p. 241.

[He was stopped on that point.]

As to the second ground of appeal, clearly there must be circumstances in which self-defence can be a defence to a charge of affray, but the recorder's direction on that matter meant that it was not material on the facts of the present case, and it is submitted that he was correct in so directing. Johnson could have gone away instead of fighting Sharp, and Sharp's use of the razor could not possibly have been justified. Moreover, however the incident began, it did develop into a fight in which both participated. The appeals should be dismissed.

Edward Clarke replied.

Cur. adv. vult.

Feb. 15. LORD GODDARD C.J., reading the judgment of the court, stated the facts and the evidence set out above, and continued: The question we have to decide is whether it is necessary to call at least one person to say that he or she was put in fear by the conduct of the appellants, or whether it is enough, as the recorder held, that the circumstances were such that the jury might find that reasonable people might well be intimidated or frightened.

It is remarkable what a lack of authority there is with regard to this offence. There seems to be no reported case which deals with it. It is barely mentioned in Hale's Pleas of the Crown. Coke devotes a chapter in his Third Part of the Institutes of the Laws of England (1809), chap. 72, p. 157, to private fights, duels and affrays; he says that an affray is a public offence to the terror of the King's subjects and that it is inquirable in the leet as a common nuisance, and a perusal of the paragraphs which deal with the subject certainly suggests that in his opinion the fact that a combat in public is a great breach of the royal peace is ipso facto an affright and terror to the subjects. Blackstone in his Commentaries on the Laws of England, 8th ed., book IV, chap. 11, p. 145, described the offence as the fighting of two or more persons in a public place to the terror of the King's subjects, and evidently considers that those taking part in a duel can be indicted for an affray. That would also seem to negative the necessity of calling evidence to prove that someone was actually put in terror as duels were generally, one would suppose, fought with as little publicity as possible, and those present in the capacity of seconds or surgeons would, of course, not be put in fear. The author who devotes most attention to the matter is Hawkins, in Pleas of the Crown (1824), 8th ed., vol. 1, chap. 28, p. 488. He lays down that there may be an affray when there is no actual violence, as when a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people. This, he says, was always an offence at common law and dealt with by many statutes. He then quotes in particular the Assize of Northampton, 2 Edw. 3, c. 3. Dealing with that statute he says that no wearing of arms is within the meaning of this statute unless it be accompanied with such circumstances as are apt to terrify the people. The wearing of unusual or dangerous weapons in public is only one species of affray and in our opinion it is open to a jury to find that the circumstances amount to an affray although no person is actually called to say he was put in terror. Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray while the carrying in public of a studded mace or battle axe might be, so if two lads indulge in a fight with fists no one would dignify that as an affray, whereas if they used broken bottles or knuckle-dusters and drew blood a jury might well find that it was, as a passer-by might be upset and frightened by such conduct. It is perfectly true that before the Indictments Act, 1913, an indictment for affray would have alleged that what was done was to

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[16] (1913) 8 Cr.App.R. 152.

[17] (1825) 2 C. & P. 234.

[18] Car. & M. 602.

[19] [1907] 2 K.B. 853, 860.

C. C. A.
1957

REGINA
v.
SHARP.
REGINA
v.
JOHNSON.

the great terror and disturbance of divers liege subjects, and that since that Act the mere allegation of an affray imports terror and disturbance, but in our opinion this averment is no more than one which alleges that the circumstances involve a breach of the Sovereign's peace, that it was a real disturbance of the peace by two persons fighting each other in public instead of settling their differences in the royal courts, or endeavouring by a display of force, though without necessarily using actual violence, to overawe the public, which was what was aimed at by the Assize of Northampton. Indeed, we should have thought that there could be no doubt on this matter were it not for the decision in *Field* v. *Receiver of Metropolitan Police*,[1] where the Divisional Court laid down what were the necessary elements to constitute a riot,[2] one of which [the fifth] was force or violence displayed so as to alarm at least one person of reasonable firmness and courage. From this it is deduced that evidence to that effect must be given, though not necessarily, we think, by calling a person to say: "I was terrified." It might be enough for a witness to say that persons appeared to be alarmed. Now it is true that affrays are usually classed along with unlawful assemblies, riots and routs as offences against the public peace, but we have only in this case to deal with an affray. The word "riot" is a term of art and, contrary to popular belief, a riot may involve no noise or disturbance of the neighbours though there must be some force or violence. For instance, if three persons enter a shop and forcibly or by threats steal goods therein, technically they are guilty not only of larceny or robbery but also of riot: see *London and Lancashire Fire Insurance Co. Ltd.* v. *Bolands Ltd.*[3] It may be that the fifth element referred to in *Field's* case[4] may require reconsideration at some future time, for if disturbances such as necessitated the passing of the Public Order Act, 1936, should occur again, or if there were a repetition of the Trafalgar Square riots which took place towards the end of the last century when most of the club windows in Pall Mall were smashed by an angry mob, it would seem superfluous if someone had to go into the witness-box and say that he or some passers-by felt or appeared afraid or apprehensive. We need give no final decision on this point so far as riots are concerned, but in our opinion there was in the present case evidence on which the jury could find that the appellants were guilty of an affray, and on that matter the recorder's direction was right.

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[1] [1907] 2 K.B. 853; 23 T.L.R. 736.

[2] [1907] 2 K.B. 853, 860.

[3] [1924] A.C. 836; 40 T.L.R. 603.

[4] [1907] 2 K.B. 853.

We must now turn to the second ground of appeal. It will be remembered that the appellant Sharp contended that he only acted in self-defence after he had been set upon by the other appellant and apparently attempted to excuse the use of a razor because he was handicapped by his crippled condition. Johnson also seems to have endeavoured to justify his conduct in biting off his opponent's ear by the fact that he was attacked with a razor. Now as the recorder said, and we see no reason why he should not, one object in charging the appellants with an affray, which is of necessity a joint offence, is that in this class of case each man throws the blame on the other, and there is a danger that, perhaps being disgusted with both and thinking each only got his deserts, a jury will acquit both if the charges are of the one wounding the other. The recorder directed the jury that it did not matter who started the fight or who was to blame, and that in the present case no question of self-defence arose. Indeed, he said more than once and with emphasis that self-defence for the purpose of this case was quite immaterial.

In our opinion this goes too far. If two men are found fighting in a street one must be able to say that the other attacked him and that he was only defending himself. If he was only defending himself and not attacking that is not a fight and consequently not an affray. A man may well defend himself and then pass to the attack, which is very likely what happened here, or, in repelling an attack, he may use more than necessary force, and again that may be the case here as a razor was used. But it appears to us inescapable that this raised questions for the jury. Sharp's case was that he was attacked by Johnson and that, as a partial cripple, he used the razor to protect himself. The jury might well have rejected this as extravagant, but we do not feel able to say that they must have done so on a proper direction. The facts are such that the court is strongly inclined to apply the proviso, but we think, on the whole, that were we to do so we should be going further than we ought, and it is obvious that one cannot be convicted and the other acquitted. We reluctantly, therefore, quash the conviction.

But we have still a power that we think should be exercised in this case, a power to exercise what is called preventive justice. Both these young men have shown themselves to be violent and aggressive and as such to be blemishers of the peace. We, as

Her Majesty's judges, are also justices of the peace for every county and we propose, therefore, to exercise the powers given by the Justices of the Peace Act, 1361, and which have been confirmed by the well-known decisions in *Wise* v. *Dunning* [5] and *Lansbury* v. *Riley*.[6] We order each of them to enter into a recognizance and to give a surety in the sum of £50 to keep the peace and be of good behaviour for 12 months, and in default to go to prison for six months.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

E. M. W.

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[5] [1902] 1 K.B. 167; 18 T.L.R. 85.

[6] [1914] 3 K.B. 229; 29 T.L.R. 733.

C. A.
1956
Nov. 1.

Singleton, Jenkins and Parker L.JJ.

KNIGHT *v.* LAMBRICK CONTRACTORS LTD.

[1954 K. No. 1194.]

Building — Safety regulations — Excavations — Unknown pre-existing excavation—Injury to workman—Liability of employers—"Excavation, pit or opening in the ground"—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 77.

The defendants, building and demolition contractors, were engaged by a local authority to clear a housing site, part of which consisted of old stables and a conservatory. While the plaintiff and other workmen, employed by the defendants, were engaged in demolishing the remains of the conservatory, the ground on which the plaintiff was standing collapsed beneath him and he fell some eight feet to the bottom of a water tank and sustained injury. The tank had been covered by two slate slabs, one of which had apparently been dislodged by the plaintiff working above it. On top of the slabs there had been a quantity of debris and soil, and the existence of the tank was unknown to the defendants. The plaintiff sued the defendants for damages, alleging, inter alia, a breach of regulation 77 of the Building (Safety, Health and Welfare) Regulations, 1948 [1]:—

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[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 77: "(Fencing of excavations, etc.)—"Every accessible part of an excavation, pit or opening in the ground "into or down the side of which a "person employed is liable to fall a "vertical distance of more than "6 feet 6 inches shall be provided "with a suitable barrier to a height "of at least 2 feet and as close as "is reasonably practicable to the

Held, that regulations 75 to 78 applied only to excavations or openings in the ground made by a contractor in connexion with the building work on which he was engaged, and the defendants were not in breach of any statutory duty.

Decision of Pilcher J. affirmed.

APPEAL from Pilcher J.

The defendants, Lambrick Contractors Ltd., building and demolition contractors, were engaged by the local authority to clear a site on the Foxhole Estates, Queen's Road, Weybridge, Surrey, for housing purposes. Part of the estate consisted of some old stables and a conservatory. The latter consisted of only two walls—one in the front, about two feet high, and a fairly high one at the back. The rafters and glass had collapsed. The plaintiff, with two or three other workmen under a foreman, were engaged in demolishing the remains of the conservatory, and while the plaintiff was using a sledge-hammer to knock down the front wall the ground on which he was standing collapsed and he fell some eight feet to the bottom of a water tank and sustained injury. The tank top had been covered by two slate slabs, one of which had apparently been dislodged by the working of the plaintiff above it. Above the slabs there had been a considerable quantity of debris, soil and weeds. On a previous inspection of the site an open well tank had been found by the foreman some 14 yards from the conservatory, and he had warned the plaintiff and the other men to avoid that tank, but he had no reason to believe the existence of another tank nearer the conservatory, which, being completely covered over, could not have been revealed by reasonable inspection.

The plaintiff sued the defendants for damages, alleging breach of common law duty and also a breach of regulation 77 of the Building (Safety, Health and Welfare) Regulations, 1948. The trial judge found for the defendants on both the points of claim. The plaintiff appealed.

Peter Pain for the plaintiff. Regulation 77 of the Building (Safety Health and Welfare) Regulations, 1948, is wider than

"edge: Provided that the foregoing "requirement shall not apply to any "part of an excavation, pit or opening while (and to the extent to "which) the absence of such barrier "is necessary for the access of "persons or for the movement of "plant or materials or while (and to "the extent to which) it has not yet "been practicable to erect such "barrier since the formation of that "part of the excavation, pit or "opening."

the previous regulations, which dealt only with "pit or excavation," and it is submitted that the words "excavation, pit or opening in the ground" cover the tank into which the plaintiff fell. The judge was in error in lumping together the four regulations 75 to 78 and in not dealing specifically with the words which appear for the first time in regulation 77. He held that they related only to an excavation made by the contractor and therefore did not relate to any pre-existing opening in the ground. There is nothing in regulations 75 and 76 to restrict them to work being done at the time of the demolition. It could not be said that a contractor was entitled to wash his hands of responsibility for any pre-existing excavation.

[JENKINS L.J. The proviso to regulation 77 appears to be your biggest difficulty.]

As an excavation it did not cease to be an excavation when someone put two pieces of slate over the top. [*John Summers & Sons* v. *Frost* [2] was referred to.]

Alan S. Orr and *Patrick Medd* for the defendants. If the plaintiff is right it follows that any builder engaged in work on a site covered with soil, debris and weeds, and in which there is unknown to him a cavity in the ground, is liable both civilly and criminally. The court should not attribute that intention to regulations which are unambiguous. Regulation 77 is intended to relate to excavation, pit or opening made in the course of the work of demolition. The object of the regulations is to prevent the hazards peculiarly connected with the building trade. It is not a building hazard that a workman may fall into a tank the existence of which is unknown to him or his employer. [*London and North Eastern Railway Co.* v. *Berriman* [3] was cited.]

SINGLETON L.J. I will ask Parker L.J. to give the first judgment.

PARKER L.J. On September 28, 1950, the plaintiff, James Knight, then a man 65 years of age and working for the defendants, met with an accident, and in due course he claimed damages against them, alleging, first, that they were guilty of a breach of duty at common law; and, secondly, that they were in breach of their statutory duties under the Building (Safety, Health and Welfare) Regulations, 1948. The action was tried on March 27, 1956, by Pilcher J., who found on both points for the defendants. From that judgment the plaintiff appeals to this court, and the sole point taken, in regard to liability, is that the judge was wrong in failing to hold on the facts that the defendants were in breach of regulation 77 of those regulations.

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[2] [1955] A.C. 740; [1955] 1 All E.R. 870.

[3] [1946] A.C. 278, 313; 62 T.L.R. 170: [1946] 1 All E.R. 255.

[His Lordship stated the facts and continued:] With regard to the claim under regulation 77, the judge said: "Part IV of "the Building Regulations relates, as its heading shows, to "'Excavations' and consists of regulations 75 to 78. The "plaintiff relies in this case on regulation 77. I think it is quite "clear that the excavations which are dealt with by all those four "regulations are excavations made by a building contractor or "some independent contractor in connexion with whatever "building work is being done on the site."

Mr. Pain, for the plaintiff, in an attractive argument, has pointed out that the judge does not there deal specifically with the words which appear in regulation 77 and in that regulation for the first time, namely, "pit or opening in the ground." Mr. Pain says it is true that this regulation appears under a section dealing with excavation, but he submits that that does not assist if the words of the regulation in question are plain, and he adds that when you come to regulation 77, the mischief aimed at is the prevention of people falling into (to use a neutral term) holes in the ground; and that, looked at in that light, it matters not whether the hole is already there or whether it is a hole which has been made by the contractor in the course of his work.

For my part, I think it is plain that some limit must be put on those words "excavation, pit or opening in the ground." Mr. Pain, as I understand it, submits that any hole (again to use a neutral term) comes within the ambit of these regulations when it is a hole into which someone engaged on the work is liable to fall. He says this man did fall, and that, accordingly, it is a hole within the ambit of regulation 77. Such a hole might be anywhere on the land on which the workmen are engaged. It seems to me that some limitation must be put on those words, and in the context in which they appear I think that they are limited to excavations, pits or openings made by the contractor in the course of his work on the site.

I say that for these reasons: to begin with, I think it is reasonably plain that regulation 75 is dealing with excavations made by the contractor himself. I need not read the regulation in full, but the opening words point to that; they say: "An "adequate supply of timber of suitable quality or other suitable "material shall where necessary be provided and used to prevent, "so far as is reasonably practicable and as early as is reasonably "practicable in the course of the work, danger to any person "employed from a fall or dislodgment of earth . . ." It seems to me that that regulation is concerned with the danger of earth falling on to a workman, and with earth falling from the side of excavations made by the contractor on the site.

Regulation 76 is clearly directed only to excavations made by the contractor. It provides: "No excavation or earthwork which "is likely to reduce so as to endanger any person employed "the security or stability of any part of any structure, whether "temporary or permanent, shall be commenced or continued "unless" certain steps are taken. It is true that when one gets to regulation 77 the further words "pit or opening in the ground" appear, and it is true that that is dealing with danger to persons employed falling into the excavation, pit or opening. But I get considerable assistance from the proviso to that section, which reads as follows: "Provided that the foregoing requirement shall "not apply to any part of an excavation, pit or opening while "(and to the extent to which) the absence of such barrier is "necessary for the access of persons or for the movement of "plant or materials"—and these are the material words—"or "while (and to the extent to which) it has not yet been practicable to erect such barrier since the formation of that part of "the excavation, pit or opening."

It seems to me that the proper inference is that that is referring to a formation by the builder or those in charge of the works. And if there were any remaining doubt, I think one is entitled to look at the heading of the section which is "Excavations." It is the fourth part dealing with operations, and in this section dealing with the operation of excavation. In the case of ambiguity one is, I think, entitled to look at the heading and to hold that these regulations in this Part fall under the umbrella of what may be described as the operations of excavation. For those reasons I am satisfied that in their context the words "excavation or opening" must be confined to excavations, pits or openings made by the contractor in the course of his work on the site.

That is sufficient to dispose of this case, but even if I were wrong on that, I, for myself, find it very difficult to bring this tank, covered as it was by slate slabs and debris, into any of those three categories of "excavation, pit or opening in the "ground." While it is unnecessary to decide the case on that ground, I have, as at present advised, very grave doubts whether those words are apt to cover the tank in this case. I would therefore dismiss this appeal.

JENKINS L.J. I agree. Mr. Pain has argued with force that regulation 77, read literally as it stands and without adding or subtracting anything, is apt to cover the underground tank into which the plaintiff unfortunately fell. But, notwithstanding Mr. Pain's argument, I am satisfied that it is necessary to put some limit upon the meaning of the words "excavation, pit or "opening in the ground." These words surely cannot mean an excavation, pit or opening anywhere and of whatever origin, provided it is 6 ft. 6 ins. or more in depth. Nor, as it seems to me, can it mean any excavation, pit or opening of whatever origin on any building site, for then one would be left in complete uncertainty as to the extent of the area surrounding a place where building operations were going on which should properly be termed the site for this purpose. Some limitation, therefore, is necessary, and once one is satisfied that some limitation is necessary, to my mind it is right to ascertain the proper limitation by reference to the scheme of the regulations and the other provisions which they contain.

Under regulation 2, "Application of Regulations," "These "Regulations shall apply to the following operations"—and "the following operations" include building. Accordingly, regulation 77 is enacted in relation to building operations. Pursuing that line of argument, one finds, as Mr. Orr has pointed out, that the regulations are divided into a number of Parts. Part I is "Interpretation and General"; Part II, "Scaffolds "and Means of Access"; Part III, "Raising and Lowering"; Part IV, "Excavations"; Part V, "Demolition." Each of the last-mentioned four Parts relates to things customarily done in the course of building operations, and which, if done, require some precaution or other for the safety of the persons engaged in the operations. One would, therefore, expect the provisions relating to excavations, pits or openings to be directed to excavations, pits or openings made in the course of building operations. As Mr. Orr pointed out, it is common, if not indeed universal, that in the course of building operations there should be some degree of excavation or that some pit or opening should be made, whereas such hazard as is involved in the shape of the possibility that some disused well or vault or other old pit or opening should exist in ground is not peculiar to ground upon which building operations are to be carried on, and is not a hazard in any sense

C. A.
1956

KNIGHT
v.
LAMBRICK
CONTRACTORS
LTD.

Jenkins L.J.

peculiar to the carrying on of building operations. Accordingly, it seems to me that the scheme of these regulations points to the conclusion that the provisions regarding excavations relate only to excavations and the like brought into being in the course of building operations. In my view that conclusion is strongly borne out by reference to the fasciculus of regulations contained in Part IV under the heading "Excavations."

As Parker L.J. has pointed out, regulations 75 and 76 clearly relate only to excavations made in the course of the work, and they are followed by the regulation on which the plaintiff relies, namely, regulation 77, which, as Mr. Pain has said, contains in itself nothing to show that it is limited to excavations, pits or openings made in the course of building operations; but I agree with Parker L.J. that assistance is to be found in the proviso, the material words being: "Provided that the foregoing requirement shall not apply to any part of an excavation, pit or opening . . . while (and to the extent to which) it has not yet been practicable to erect such barrier since the formation of that part of the excavation, pit or opening." Those words, as it seems to me, point strongly to the conclusion that regulation 77 is concerned, and concerned only, with excavations, pits or openings made in the course of the building operations.

Accordingly, I agree that this appeal should fail on the ground that the judge rightly held that regulation 77 applied only to excavations, pits or openings made in the course of building operations. It is therefore unnecessary, for the purposes of deciding this appeal, to consider the question whether the particular underground tank in this case was an excavation, pit or opening in the ground within the meaning of regulation 77. There seems to me to be cogent reasons for holding that it does not fall within that language, but it is unnecessary, in my view, to form any concluded opinion upon that point. It is to be observed that this tank was completely covered over until the unfortunate plaintiff dislodged one of the slates in the course of his work. I think there is substantial ground for the view that the regulation cannot have been intended to apply to any excavation, pit or opening which is not open or in such a condition that there is an uncovered orifice through which some person might be liable to fall. If that were not so, it would be necessary under the regulations to fence round every pit or opening, for instance, a cellar in a house, notwithstanding that the opening into it was securely covered, or believed to be securely covered, with a floor

C. A.
1956

KNIGHT
v.
LAMBRICK
CONTRACTORS
LTD.

Jenkins L.J.

or planks, or otherwise physically covered over by a covering, which, while it remained, would prevent anyone falling through.

I think that view is perhaps borne out by the reference in the regulation to the edge of the excavation, pit or opening. In regulation 77 one has: "shall be provided with a suitable barrier to a height of at least 2 feet and as close as is reasonably practicable to the edge"; and in regulation 78: "(1) Material shall not be placed or stacked near the edge of any excavation, pit or opening in the ground so as to endanger persons employed below. (2) No load shall be placed or moved near the edge of any excavation where it is likely to cause a collapse of the side of the excavation and thereby endanger any person." Those references to "the edge" to my mind do suggest an uncovered excavation, pit or opening in the ground. But, as I have said, it is unnecessary, in my view, to decide that point, so I will not take up further time upon it, but will confine myself to holding that on the first of the two grounds with which I have dealt, which is the ground adopted by the judge, this appeal fails and should be dismissed.

SINGLETON L.J. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. H. Thompson; J. H. Milner & Son.*

A. W. G.

REGINA *v.* HALLAM.

C. C. A.
1957
Feb. 25.

Lord Goddard C.J., Stable, Cassels, Gorman and Hinchcliffe JJ.

Criminal Law—Explosive substances—"Knowingly" possessing—Whether knowledge that substance is explosive necessary—Explosive Substances Act, 1883 (46 *&* 47 *Vict. c.* 3), *s.* 4 (1).

The appellant was charged on an indictment preferred under the Explosive Substances Act, 1883, s. 4 (1),[1] with "knowingly [having] in his possession . . . certain explosive substances under such circumstances as to give rise to a reasonable suspicion that

[1] Explosive Substances Act, 1883, s. 4 (1): "Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony."

C. C. A.
1957

REGINA
v.
HALLAM.

"they were not in his possession . . . for a lawful object." The judge directed the jury that for the purposes of the subsection it did not matter whether or not the appellant knew that the substance in his possession was explosive. The jury convicted the appellant, who was sentenced to three years' imprisonment. On appeal:—

Held, that on the true construction of section 4 (1), it was a necessary ingredient of the offence that the accused should know that the substance in his possession was in fact an explosive substance; the judge had, therefore, misdirected the jury.

Dicta in *Rex* v. *Dacey* (1939) 55 T.L.R. 670; 27 Cr.App.R. 86; [1939] 2 All E.R. 641 not followed.

APPEAL against conviction.

The appellant, James Edward Hallam, was charged at the Central Criminal Court, on an indictment preferred under section 4 (1) of the Explosive Substances Act, 1883, with "knowingly "[having] in his possession or under his control certain explosive "substances, to wit, 15 pieces of gelignite and 34 detonators "under such circumstances as to give rise to a reasonable "suspicion that they were not in his possession or under his "control for a lawful object." The Recorder of London directed the jury that it mattered not for the purposes of the subsection whether or not the appellant knew that the substance which he had in his possession was an explosive substance. The jury convicted the appellant, who was sentenced to three years' imprisonment. He had appealed on the ground that the recorder had misdirected the jury.

Gerald Gardiner Q.C. and *Brendan J. Shaw* for the appellant. On a charge under section 4 (1) of the Explosive Substances Act, 1883, the prosecution has to prove a reasonable suspicion that the defendant did not have the substance in his possession for a lawful object. *Rex* v. *Dacey* [2] has the effect of changing the onus and of putting on the defendant the onus of proving that he did not know that the substance in his possession was an explosive substance. The words "has in his possession" must have an object; the word "knowingly" must apply to the adjective, i.e., the *explosive* substance, as well as to the verb. Therefore, the prosecution must on any view show that the defendant *knew* that he had in his possession the substance referred to in the indictment and that he knew (1) what the substance was, and (2) its qualities, i.e., that it was explosive.

[LORD GODDARD C.J. Must the Crown give evidence that the accused knows the substance is explosive?]

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[2] (1939) 55 T.L.R. 670; 27 Cr.App.R. 86; [1939] 2 All E.R. 641.

Yes; use of the word "knowingly" puts upon the Crown the onus of proving knowledge. The recorder's direction to the jury was wrong because it was said in effect that the defendant need not know that he had in his possession the substance named in the indictment; that if the defendant knew that he had a parcel which *in fact* contained an explosive, and the circumstances were suspicious, then that was all the prosecution need prove. The direction of Cassels J. to the jury in *Rex* v. *Dacey*[2] was right, and the law as stated by the Court of Criminal Appeal in that case is wrong.

Sir Harry Hylton-Foster Q.C., S.-G. and *J. H. Buzzard* for the Crown. The law as stated in *Rex* v. *Dacey*[2] is correct—and even if it be wrong this court is not bound by it—and the recorder's direction to the jury in the present case was right. "Knowingly" in the section cannot be applied to the substance apart from its characteristics. It is sufficient for the prosecution to show knowledge of his possession of the contents of the parcel on the part of the accused, plus suspicious circumstances. The defendant must then give an explanation as to how he came to be in possession of the contents of the parcel for a lawful object.

Gerald Gardiner Q.C. in reply. If it be right that all that the prosecution had to show is that the defendant had in his possession what was in fact an explosive substance in suspicious circumstances, then the word "knowingly" means nothing. That cannot be the right construction.

LORD GODDARD C.J. The appellant was convicted before the Recorder of London on an indictment preferred under the Explosive Substances Act, 1883, which charged him that he "knowingly had in his possession or under his control certain "explosive substances, to wit, 15 pieces of gelignite and 34 "detonators under such circumstances as to give rise to a reasonable suspicion that they were not in his possession or under "his control for a lawful object." The jury convicted and the court passed a sentence, which in the circumstances must be regarded as a lenient one, of three years' imprisonment.

The appeal has been heard by a full court because of a judgment of the Court of Criminal Appeal in *Rex* v. *Dacey*.[1] The point raised is purely a matter of construction of section 4 (1) of the Explosive Substances Act, 1883, which is in these terms: "Any person who . . . knowingly has in his possession or

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[2] 55 T.L.R. 670.

[1] (1939) 55 T.L.R. 670; 27 Cr. App.R. 86; [1939] 2 All E.R. 641.

"under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . "does not have it in his possession or under his control for a "lawful object, shall, unless he can show that he . . . had it in "his possession or under his control for a lawful object, be guilty "of felony."

The whole question is whether the word "knowingly" means that he must know, not only that he has a parcel or a substance in his possession but also that it is an explosive. The words, I repeat, are "knowingly has in his possession any explosive "substance." Having given the best consideration that we can to this case, we think that the words must mean that he must know that it is an explosive substance. In *Rex* v. *Dacey*[1] Cassels J. directed the jury in these words: "What you have to "be satisfied upon is, did he knowingly have these things in his "possession he knowing that they were explosive substances?"[2] The difficulty is that in that case the Court of Criminal Appeal held that statement to have been made per incuriam. Despite some confusion which seems to have existed as to what he meant, Cassels J., who is a member of this court, says that that is what he said and what he meant to say. The Court of Criminal Appeal upheld the conviction because they refused the application for leave to appeal. It was a case which was not argued because counsel did not appear on either side. The Solicitor-General, who has appeared for the prosecution in the present case, has not contended that this court is bound by that decision, which was to a great extent obiter. The court decided in that case that it was sufficient to show that a man had in his possession something which proved to be an explosive substance, provided also that there was some evidence of suspicious circumstances from which a jury could draw the inference that he did not have it in his possession for a lawful purpose. Of course, if a suspicious circumstance is proved, there is an onus upon the accused to show that the explosive was in his possession for a lawful purpose.

The recorder in the present case charged the jury that it did not matter whether or not the appellant knew that the substance which he had in his possession was an explosive. We think that the recorder in so charging the jury was applying *Dacey's* case,[3] but with all respect to that case this court cannot take that view. We think that the clear meaning of the section is that the man must not only knowingly have in his possession the substance but must know that it is an explosive substance. It seems that it is an ingredient of the offence that he knew it to be an explosive substance. If, of course, there is evidence that the man had the substance in his possession, and evidence of circumstances which give rise to a reasonable suspicion that he had not got it for a lawful object, the jury are then entitled to infer that he knew it was an explosive substance. We think that the proper direction to give to a jury in this case is that they must first be satisfied that he had the substance in his possession; secondly, that they must be satisfied that it was in his possession under circumstances such as to give rise to a reasonable suspicion that he had it in his possession for an unlawful object, and then that if they are so satisfied, they can infer that the man knew it was an explosive substance. It is not necessary to show that he had any particular chemical knowledge. What he had in his possession may be gelignite, dynamite or gunpowder, but if he had it in his possession under such circumstances as to give rise to a suspicion that he had it for something other than a lawful object, it is only a short step for the jury, taking into account all the circumstances, to consider that he knew quite well he had it in his possession for an unlawful purpose, namely, causing an explosion.

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[1] 55 T.L.R. 670.

[2] 27 Cr.App.R. 86, 87.

[3] 27 Cr.App.R. 86.

If the argument which found favour in *Dacey's* case [3] takes the word "knowingly" out of the section, it would simply mean that any person who has in his possession an explosive substance in such circumstances as to give rise to a reasonable suspicion, does not have it in his possession for a lawful object unless he can show he has it in his possession for a lawful object and is guilty of felony. It would then have to be shown that he had it in his possession for an unlawful object. We think the ordinary prima facie construction of the section is that he must knowingly have in his possession an explosive substance, and that must be that he knows he has a substance which is in fact explosive and, as I say, that can be inferred from the facts of the case. We think, therefore, that there was a misdirection by the learned recorder. The right direction would, however, be: "If you come "to the conclusion that this man had this in his possession under "circumstances which give rise to reasonable suspicion and he "has not satisfied you that he had it for a lawful purpose, you "can infer, if you choose, that he knew what it was that he had "in his possession." When it is found that this man had in his

[3] 27 Cr.App.R. 86.

C. C. A.
1957
REGINA
v.
HALLAM.

possession 15 pieces of gelignite and 34 detonators, it is impossible to believe that he did not know that he had explosives in his possession, more especially from one very significant piece of evidence he gave when he went into the witness-box. Having said that he had thrown the parcel behind the hedge, he said: "I went "and took it from the hedge to the taxi in case children might "touch it." The story which the appellant told as to how he came into possession of this material and what he did with it was a story which no jury under any circumstances would believe. Accordingly, although we decide the point of law in the prisoner's favour, and although we differ from the decision in *Rex* v. *Dacey*,[3] we have come to the conclusion that it is a case in which we should properly apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and we dismiss the appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

P. P.

C. A.
1957
Feb. 12, 25.
Denning, Romer and Parker L.JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL.
Ex parte GILMORE.

National Insurance—Industrial injuries benefit—Paired organ, injury to—Decision by medical appeal tribunal—Error of law on face of decision—Statute providing that "any decision of a claim or "question . . . shall be final"—Remedy by certiorari not taken away—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 36 (2) (3), 40 (1)—*National Insurance (Industrial Injuries) (Benefit) Regulations,* 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5)—*National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations,* 1948 (*S.I.* 1948, *No.* 1299), *reg.* 13.

Crown Practice—Certiorari—Error of law on face of record—Report referred to in record incorporated in record—Inferior tribunal—Power of court to order completion of record—Statutory provision that "decision . . . shall be final"—Remedy by certiorari not taken away save by express words.

Section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides: ". . . any decision of a claim or question ". . . shall be final."

In 1936 the applicant, a colliery pick sharpener, sustained an injury to both eyes while at work, his right eye being rendered almost blind. In March, 1955, he suffered a further injury at work, by which the condition of his left eye was so severely aggravated that in the result he was almost totally blind. On his claim for disablement benefit under the National Insurance (Industrial Injuries) Act, 1946,[1] two medical boards provisionally assessed the degree of disablement at 100 per cent.; but a third board made no award. The claimant appealed to a medical appeal tribunal which had before it and incorporated in its award an extract from a specialist's report setting out the facts as to the state of both eyes; but in making its award the tribunal assessed the aggravation at only 20 per cent., showing thereby that they had failed to assess in accordance with regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948[2] (relating to industrial injuries to paired organs).

Regulation 13 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948,[3]

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[1] National Insurance (Industrial Injuries) Act, 1946, s. 36 (2): "Subject to the foregoing provisions of "this section, any claim for benefit "and any question arising in connexion with a claim for or award of "benefit shall be determined by an "insurance officer, a local appeal "tribunal or the Commissioner "appointed or constituted in accordance with the following provisions "of this Act. (3) Except as provided "by this Part of this Act or by the "Family Allowances Act, 1945, as "applied by paragraph (*b*) of subsection (1) of this section, any "decision of a claim or question as "provided by the foregoing provisions "of this section shall be final."

S. 40: "Review of decisions of "medical boards and medical appeal "tribunals.—(1) Any decision under "this Act of a medical board or a "medical appeal tribunal may be "reviewed at any time by a medical "board if satisfied by fresh evidence "that the decision was given in consequence of the non-disclosure or "misrepresentation by the claimant "or any other person of a material "fact (whether the non-disclosure or "misrepresentation was or was not "fraudulent)."

[2] National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948, No. 1372), reg. 2: "Assessment of disablement and prescribed degrees of disablement. . . . "(5) Where as a result of the relevant accident a claimant has "suffered an injury to an organ of "his body which in a person whose "physical condition is normal would "be one of two similar organs, the "functions of which would be interchangeable or complementary, in "assessing the extent of the disablement resulting from the relevant loss of faculty for any period "during which the claimant may be "expected to be subject to any disability resulting from that injury— "(*a*) any disability in respect of the "other organ to which the claimant "would in any case have been subject by reason of a congenital "defect, or an injury or disease "received or contracted before the "relevant accident and not attributable to any accident against which "he was insured under the Act, shall "nevertheless be treated as having "been incurred as a result of the "relevant loss of faculty; . . ."

[3] National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1299), reg. 13: "Record and notice of decision of a "medical appeal tribunal.—(1) A "tribunal shall in each case record "their decision in writing in such "form as may from time to time be "approved by the Minister, and shall "include in such record, which shall "be signed by all the members of the "tribunal, a statement of the "reasons for their decision, including "their findings on all questions of "fact material to the decision."

C. A.
1957

Regina
v.
Medical
Appeal
Tribunal.
Ex parte
Gilmore.

requires a tribunal to record their decision in writing and to include in such record " a statement of the reasons for their decision, "including their findings on all questions of fact material to the "decision." The applicant applied for an order of certiorari to quash the decision of the tribunal on the ground that there was a manifest error of law on the face of the record:—

Held, (1) that the effect of incorporating the extract from the specialist's report was to make the whole report part of the record, thereby disclosing to the court an error of law on the face of the record.

Per Denning L.J. In any event the court had power to order the tribunal to complete the record by finding the material facts, for the tribunal could not defeat an application for certiorari by failing to find such facts.

Williams v. *Lord Bagot* (1824) 4 Dow. & Ry. 315 and *Rex* v. *Warnford* (1825) 5 Dow. & Ry. 489 applied.

(2) That the remedy by certiorari was available to quash a decision of the tribunal—as also (*semble*) of national insurance and industrial insurance commissioners—for an error of law on the face of the record, despite the provision in section 36 (3) that " any "decision of a claim or question . . . shall be final"; those words meant only that the decisions specified could not be the subject of appeal or reference; they did not suffice to prohibit applications for certiorari, whether on the ground of error of law on the face of the record or excess or lack of jurisdiction. A long line of authority shows that the remedy by certiorari is not to be taken away save by clear and express words in an Act of Parliament.

Reg. v. *National Insurance Commissioner, Ex parte Timmis* [1955] 1 Q.B. 139; [1954] 3 All E.R. 292 considered.

Per Romer L.J. It is not in the public interest that inferior tribunals of any kind should be the ultimate arbiters on questions of law.

Appeal from the Divisional Court.

In 1936, the applicant, Robert Gilmore, a colliery pick-sharpener, was injured in both eyes by lime burns. He was rendered almost blind in his right eye but had sufficient sight in his left eye to enable him to continue at his work as a blacksmith. Nineteen years later, in March, 1955, while he was at work, some ash blew out of the fire into his eyes. As a result, his left eye, on which he had relied, was rendered very much worse than it had been before, so that he was no longer able to do his work as a blacksmith; he was very nearly blind in both eyes.

He claimed disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. The first medical board, on October 22, 1955, made a provisional award under which they assessed the degree of disablement at 100 per cent. The second medical board, on January 17, 1956, made a similar provisional award of 100 per cent. But a third medical board, on March 6, 1956, found that, although his sight was still very bad, it was due to a pre-existing condition and was not due to the accident in March, 1955; and they made no disablement award at all. He appealed to the medical appeal tribunal, sitting at Newcastle-upon-Tyne, which asked a specialist to examine him.

On May 16, 1956, the specialist gave his report, which was in favour of the workman. So far as material it stated: "The right "eye is densely scarred from the lime burns in 1936 and has no "connexion with the recent injury, except that being a blind eye "he had no vision in reserve and was entirely dependent on the "left eye. We have the definite evidence that from 1936 till "1955 he worked as a blacksmith (pick-sharpener). He tells me "that he actually performed the work himself and was not supervising. He certainly could not do this now with his present "sight and so I feel satisfied that his sight was further markedly "impaired as a result of his accident and hypopion ulcer. I "should consider that his defective sight was aggravated by the "injury on March 17, 1955, and that this aggravation will be permanent. In regard to prognosis it is too early to say. The "graft at present is not transparent enough to give useful sight "but it may improve or alternatively it may be possible to do a "further graft with better results."

On June 13, 1956, the medical appeal tribunal gave their decision in these words: "With reference to your claim for "disablement benefit, the medical appeal tribunal which considered your case on June 11, 1956, decided that a loss of "faculty has resulted from the industrial accident on March 17, "1955. The extent of the disablement from the loss of faculty "is to be assessed at 20 per cent. for the period from April 15, "1956. This is a final assessment. The findings of the tribunal "are summarized as follows: Hearing commenced de novo. The "specialist . . . states in his report of May 16, 1956, 'I consider "'that the defective sight was aggravated by the injury on "'March 17, 1955, and that the aggravation will be permanent.' "Further treatment is said to be contemplated. Mr. Gilmore "had a pre-existing condition of corneal dystrophy hypopion "ulcer of which the relationship to injury is doubtful. There "remains, however, a possibility of aggravation by the relevant "condition and we give Mr. Gilmore the benefit of the doubt. "We assess the aggravation at 20 per cent."

When the applicant received that decision, his advisers took the view that the medical appeal tribunal had failed to apply regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, since the 20 per cent. represented only the aggravation to the left eye, and ignored the bad sight in the right eye which, according to the regulation, ought to be treated as the result of the injury to the left eye. The applicant's advisers first sought to get the matter put right by applying to a medical board for a review. They relied on section 40 (1) of the Act of 1946, which provides that "Any decision under this Act "of a medical board or a medical appeal tribunal may be reviewed "at any time by a medical board if satisfied by fresh evidence "that the decision was given in consequence of the non-"disclosure or misrepresentation by the claimant or any other "person of a material fact. . . ." The medical board held that the case did not come within that provision for review. The applicant appealed to the medical appeal tribunal. On December 10, 1956, the tribunal rejected his appeal on the ground that his contention was "not fresh evidence or the non-disclosure of "a material fact, but a submission that the tribunal (in their "decision of June 13, 1956) had misdirected itself in a matter of "law which is not a matter on which a medical board can be "expected to pronounce."

The applicant having thus exhausted all the statutory ways of correcting the decision of the medical appeal tribunal, sought redress from the Queen's courts. On January 22, 1957, he moved the Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.) ex parte for leave to apply for an order for certiorari to quash the decision; but the court refused his request, giving no reasons for its decision. On January 28, 1957, he moved the Court of Appeal ex parte which granted his request. The court was of opinion that they ought to extend the usual time limit of six months because he had not been guilty of any delay in seeking redress, and that there was some ground for thinking that there was an error on the face of the record.

On February 12, 1957, the application came on for hearing in the Court of Appeal. After the case had been opened, counsel for the Ministry of Pensions and National Insurance and for the tribunal informed the court that he had carefully considered the matter with the responsible officers of the Ministry and, as a result, he conceded that the decision of the medical appeal tribunal of June 13, 1956, was erroneous in point of law; he added that the Ministry were in some difficulty because the chairman of the tribunal had died.

Despite that concession, the court of its own motion considered that as the application raised points of considerable importance, judgment should be reserved.

[NOTE: In view of the concession made on behalf of the Ministry and the tribunal the points of law decided by the court were not fully argued.]

David Turner-Samuels for the applicant. The award of the tribunal did not record any finding of fact with regard to the right eye, but brought in the specialist's report, which thereby became part of the record and makes manifest the error of law on the face of the record, showing that the tribunal did not correctly apply or, alternatively, overlooked the requirements of regulation 2 (5) of the Benefit Regulations. Even if the specialist's report had not been brought in, the tribunal could have been required, by regulation 13 of the Determination of Questions Regulations, to make their findings available to the applicant and to give the reasons for their decision.

Section 36 (3) of the Act of 1946 provides that " any decision " of a claim or question . . . shall be final."

[PARKER L.J. Has it ever been decided that where an Act provides that a tribunal's decision " shall be final," certiorari can be used to quash it because of an error of law on the face of the decision, as distinct from quashing for lack of jurisdiction?]

In *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[4] which reviewed the whole history of certiorari, this court held that in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.*[5] the House of Lords had decided that certiorari lay for an error on the face of the record, and that there was no distinction between such a case and one where there had been lack or excess of jurisdiction.

[DENNING L.J. This point was taken for the Ministry on a different Act in *Taylor (formerly Kraupl)* v. *National Assistance Board* [6] before Lord Merriman P., but it was not pursued in the Court of Appeal. I have always thought that if an Act made a decision of a tribunal " final " it was only so on the assumption that it was made in accordance with law.]

The distinction between the two grounds for certiorari only arose because under Jervis's Acts records of courts of summary jurisdiction were not "speaking orders," so that questions as to errors on the face of the record could not be considered: see *Rex* v. *Nat Bell Liquors Ltd.*,[7] *per* Lord Sumner.[8]

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[4] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[5] (1878) 4 App.Cas. 30.

[6] [1956] P. 470; [1956] 2 All E.R. 455; [1957] P. 101; [1957] 1 All E.R. 183 (C.A.).

[Parker L.J. Your strongest argument on the right to certiorari here is the analogous procedure with regard to arbitrations, whether or not the arbitrator's decision is stated to be "final," for it all springs from the same jurisdiction.]

[Romer L.J. I am bound to say that when section 36 (3) says that the decision "shall be final" it appears to mean only that it shall not be subject to the right of appeal conferred by sections 37 and 46 of the Act; it means only "not appealable."]

The applicant does not seek to appeal the decision.

Rodger Winn for the Ministry and the tribunal. It has been thought fit to concede that certiorari could issue to quash this particular award, for the error of law is apparent on the face of the record, and the tribunal will immediately reassess and apply regulation 2 (5) fully. The tribunal's reasoning cannot be known, for the chairman has since died.

The question whether the prerogative writs are excluded by words such as those in subsection (3) of section 36 depends in each case on the construction of the particular statute and the particular case. The statement in Halsbury's Laws of England, 3rd ed., vol. 11, p. 137, is that certiorari can only be taken away by statute by express negative words.

[Parker L.J. Do you agree that this case is breaking new ground?]

It is ground which has already been lightly forked over, for the point was taken before Lord Merriman P. in *Taylor (formerly Kraupl)* v. *National Assistance Board*,[9] where an interpretative declaration was sought under R.S.C., Ord. 54A, r. 1A; but as that case developed, the point was abandoned by the Ministry and was not pursued in the Court of Appeal.[10] In the present Act, if the decision is on a matter of fact it "shall be final"; but if a misapplication of statutory requirements is apparent on the face of the award, certiorari can check such an error unless the Act has either taken away certiorari by express words or has provided an alternative procedure.

The Ministry wishes to keep open the question whether certiorari would issue, for an error of law on the face of the record, to the industrial injuries commissioners, as distinct from a medical appeal tribunal. That point was left open in *Reg.* v. *National Insurance Commissioner, Ex parte Timmis.*[11] Though the commissioners are listed with the tribunal in subsection (2) of section 36, there are great differences between their functions and those of a tribunal, and it may be desired, if the necessity arises, to submit that certiorari would not issue to commissioners.

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[7] [1922] 2 A.C. 128; 38 T.L.R. 541.

[8] [1922] 2 A.C. 159–160.

[9] [1956] P. 470.

[10] [1957] P. 101.

Turner-Samuels in reply. As section 36 (2) includes the commissioners, then if certiorari is not excluded by subsection (3) it would lie also against a determination by the commissioners.

[PARKER L.J. There is no reason in principle why certiorari should not lie against such a decision if there has been an error of law.]

[DENNING L.J. In view of the very special procedure involved in their decisions it might become a matter of discretion whether the court would allow certiorari to go.]

Cur. adv. vult.

DENNING L.J. This is an application by Robert Gilmore for an order of certiorari to remove into this court a decision of a medical appeal tribunal for the purpose of quashing it. It involves the correct application of regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948. That regulation deals with an injury to one of two "paired organs," as they are called, such as eyes, legs, and so forth. If a man with two good eyes loses the sight of one of them in an industrial accident, his disablement is assessed at 30 per cent. But if a one-eyed man (who lost the sight of an eye many years ago) should lose the sight of his remaining good eye in an industrial accident, then regulation 2 (5) says that his disablement must be assessed as if the blindness in his bad eye was itself the result of losing his good eye. In other words, the blindness in both eyes is deemed to be due to the accident. His disablement benefit is therefore to be assessed not at 30 per cent. but at 100 per cent.

[His Lordship stated the facts as set out above, and continued:] It appeared to the Ministry that the tribunal had either overlooked regulation 2 (5) or had thought that on the merits (presumably because they doubted whether there was any aggravation at all due to the injury) 20 per cent. was a fair award. In either case the tribunal had gone wrong in law. The regulation makes it clear that, once they accepted aggravation to the left

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[11] [1955] 1 Q.B. 139; [1954] 3 All E.R. 292.

C. A.
1957

REGINA
v.
MEDICAL
APPEAL
TRIBUNAL.
Ex parte
GILMORE.

Denning L.J.

eye, they ought to assess the disablement not only for the left eye but also the right eye. They were not at liberty to reduce the award because of their doubts on aggravation any more than a judge is at liberty to reduce damages because of his doubts on liability.

We might perhaps have acted on Mr. Winn's concession and quashed the decision straightaway: but in the course of the discussion some points of very considerable importance emerged on which we took time to consider our judgment.

The first point is whether the error of the tribunal appears on the face of the record. It does not appear on the face of their written adjudication of June 13, 1956. There is not a word there about the right eye, or even the left eye for that matter. But the tribunal gave an extract from the specialist's report and thereby, I think, they made that report a part of the record. Just as a pleading is taken to incorporate every document referred to in it, so also does an adjudication. Once the specialist's report is read with the record, we have before us the full facts about the previous injury to the right eye and the subsequent injury to the left. These facts are sufficient to disclose the error in law: for it is then apparent that the award of 20 per cent. must be wrong. No reasonable person, who had proper regard to regulation 2 (5), could have come to such a conclusion. It is now settled that when a tribunal come to a conclusion which could not reasonably be entertained by them if they properly understood the relevant enactment, then they fall into error in point of law: see *Edwards (Inspector of Taxes)* v. *Bairstow.*[1] When the primary facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to warrant the intervention of this court by certiorari.

I may add that, even if we had not been able to have recourse to the specialist's report, we would have been able to get the facts by ordering the tribunal to complete the record by finding the facts, as the regulations require them to. By regulation 13 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948, it is enacted that "A tribunal shall in each case record their "decision in writing . . . and shall include in such record, . . . "a statement of the reasons for their decision, including their "findings on all questions of fact material to the decision." It seems to me that the tribunal cannot, by failing to find the material facts, defeat an application for certiorari. The court has always had power to order an inferior tribunal to complete the record. Abbott C.J. long ago gave very good reasons in this behalf. He said: "If an inferior court . . . send up an incomplete record, we may order them to complete it . . . If we are "not to order, or allow the officers of the court below to make "a perfect record, which unquestionably they are at liberty to do, "it will be in their power, by making an imperfect record, to "defeat a writ of error whenever it shall be brought. The power "of doing that lies in their hands, unless we prevent it": see *Williams* v. *Lord Bagot.*[2] Likewise a tribunal could defeat a writ of certiorari unless the courts could order them to complete or correct an imperfect record. So the courts have power to give such an order: see *Rex* v. *Warnford.*[3]

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[1] [1956] A.C. 14; [1955] 3 All E.R. 48.

The second point is the effect of section 36 (3) of the Act of 1946 which provides that "any decision of a claim or question ". . . shall be final." Do those words preclude the Court of Queen's Bench from issuing a certiorari to bring up the decision?

This is a question which we did not discuss in *Rex* v. *Northumberland Compensation Appeal Tribunal*, *Ex parte Shaw*,[4] because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final," certiorari can still issue for excess of jurisdiction or for error of law on the face of the record.

Lord Coke started this train of authority when he said that the words of an Act of Parliament "shall not bind the King's "Bench because the pleas there are coram ipso Rege": see *Foster's Case.*[5] Kelynge C.J. gave the train an impetus in 1670 when an order of the Commissioners of Sewers was brought before him. It was pointed out that the statute enacted "that they "should not be compelled to certify or return their proceedings" and "that they shall not be reversed but by other Commis"sioners." Kelynge C.J. disposed of the objection by saying:

[2] (1824) 4 Dow. & Ry. 315.

[3] (1825) 5 Dow. & Ry. 489.

[4] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[5] (1615) 11 Co.Rep. 56b, 64b.

"Yet it never was doubted, but that this court might question "the legality of their orders notwithstanding: and you cannot "oust the jurisdiction of this court without particular words in "Acts of Parliament. There is no jurisdiction that is uncon"trollable by this court": see *Rex* v. *Smith*,[6] Callis on Sewers, 4th ed., p. 342.

A few years later, in 1686, the Court of King's Bench had a case where the collectors of the tax on chimneys had distrained on the landlord of a cottage. The Act said that "If any question "shall arise about the taking of any distress, the same shall be "heard and finally determined by one or more justices. . . ." The justices made a determination which was erroneous in law on its face in that it did not state sufficient grounds for making the landlord liable. The court issued a certiorari to quash their determination and said: "The statute doth not mention any "*certiorari*, which shows that the intention of the law-makers "was, that a *certiorari* might be brought, otherwise they would "have enacted, as they have done by several other statutes, that "no *certiorari* shall lie. Therefore the meaning of the Act must "be, that the determination of the justices of the peace shall be "final in matters of *fact* only": *Rex* v. *Plowright*.[7]

In 1697, in the famous case of the College of Physicians, Lord Holt gave the full weight of his authority to those decisions, especially mentioning the case of the Commissioners of Sewers[8]: see *Groenvelt* v. *Burwell*.[9] In 1760 Lord Mansfield was faced with the Conventicle Act which said "that no other court what"soever shall intermeddle with any cause or causes of appeal "upon this Act: but they shall be finally determined in the "quarter sessions only." Nevertheless Lord Mansfield ordered certiorari to issue, saying: "The jurisdiction of this court is not "taken away, unless there be express words to take it away: "this is a point settled": see *Rex* v. *Moreley*.[10]

In 1800 a conviction by justices was erroneous on the face of the record, because it did not exclude a possible defence. When the defendant moved to have it quashed, the prosecutor objected "that the defendant having elected to appeal to the "sessions, the certiorari was in effect taken away by the Act, "because it is said that the determination of the sessions should "be final": but Lord Kenyon C.J. said: "That would be

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[6] (1670) 1 Mod. 44.
[7] (1686) 3 Mod. 94, 95.
[8] 1 Mod. 45.
[9] (1697) 1 Ld.Raym. 454, 469.
[10] (1760) 2 Bur. 1041, 1043.

"against all authority; for the certiorari being a beneficial writ "for the subject, could not be taken away without express "words": see *Rex* v. *Jukes*.[11] Joseph Chitty, commenting on this case, said that the words "finally determine" merely prohibit a re-investigation of the facts: see Chitty's Practice, Vol. II, p. 219. Finally, in 1823 the Court of King's Bench in its golden age presided over by Abbott C.J. summed up the whole matter by saying that "certiorari always lies, unless it is expressly "taken away, and an appeal never lies unless it is expressly "given by the statute": see *Rex* v. *Cashiobury Hundred Justices*.[12]

It was no doubt that train of authority which Lord Sumner had in mind when he said in *Rex* v. *Nat Bell Liquors Ltd.*[13]: "Long before Jervis's Acts statutes had been passed which "created an inferior court, and declared its decisions to be "'final' and 'without appeal,' and again and again the Court "of King's Bench had held that language of this kind did not "restrict or take away the right of the court to bring the pro- "ceedings before itself by certiorari."

I venture therefore to use in this case the words I used in the recent case of *Taylor* (*formerly Kraupl*) v. *National Assistance Board*[14] (about declarations), with suitable variations for certiorari: "The remedy is not excluded by the fact that the "determination of the board is by statute made 'final.' Par- "liament only gives the impress of finality to the decisions of the "tribunal on the condition that they are reached in accordance "with the law."

In my opinion, therefore, notwithstanding the fact that the statute says that the decision of the medical appeal tribunal is to be final, it is open to this court to issue a certiorari to quash it for error of law on the face of the record. It would seem to follow that a decision of the national insurance and industrial insurance commissioners is also subject to supervision by certiorari (a point left open by the Divisional Court in *Reg.* v. *National Insurance Commissioner, Ex parte Timmis*[15]); but they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction.

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[11] (1800) 8 Term Rep. 542, 544.

[12] (1823) 3 Dow. & Ry. 35.

[13] [1922] 2 A.C. 128, 159–160; 38 T.L.R. 541.

[14] [1957] P. 101; [1957] 1 All E.R. 183.

[15] [1955] 1 Q.B. 139; [1954] 3 All E.R. 292.

C. A
1957

Regina
v.
Medical
Appeal
Tribunal.
Ex parte
Gilmore.

Denning L.J.

In contrast to the word "final" I would like to say a word about the old statutes which used in express words to take away the remedy by certiorari by saying that the decision of the tribunal "shall not be removed by certiorari." Those statutes were passed chiefly between 1680 and 1848, in the days when the courts used certiorari too freely and quashed decisions for technical defects of form. In stopping this abuse the statutes proved very beneficial, but the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end. Despite express words taking away certiorari, therefore, it was held that certiorari would still lie if some of the members of the tribunal were disqualified from acting: see *Reg.* v. *Cheltenham Commissioners*,[16] where Lord Denman C.J. said [17]: "The statute cannot "affect our right and duty to see justice executed." So, also, if the tribunal exceeded its jurisdiction: see *Ex parte Bradlaugh* [18]; or if its decision was obtained by fraud: see *Reg.* v. *Gillyard*,[19] the courts would still grant certiorari. I do not pause to consider those cases further; for I am glad to notice that modern statutes never take away in express words the right to certiorari without substituting an analogous remedy. This is probably because the courts no longer use it to quash for technical defects but only in case of a substantial miscarriage of justice. Parliament nowadays more often uses the words "final" or "final and conclusive," or some such words which leave intact the control of the Queen's courts by certiorari.

The value of this ancient writ of certiorari is well shown by the present case in which it is only by reason of it that a workman blinded at work obtains the industrial insurance benefit to which he is by law entitled, as now acknowledged on all hands. The order must issue to quash the declaration of the medical appeal tribunal of June 13, 1956. There is no need for a mandamus because the tribunal will no doubt consider the claim afresh and come to a right decision on it.

Romer L.J. I agree. In my judgment, it would be deplorable if we were constrained to hold that the decision of a medical appeal tribunal, however wrong in law, and however obviously wrong, was immune from review by Her Majesty's courts. I cast no reflection whatever on tribunals such as that in the present case, and they do their work conscientiously and with efficiency. But in the nature of things these and similar inferior tribunals (and there are many of them nowadays) are bound to go wrong from time to time in matters of law. Their members consist in the main of people who have devoted their lives to activities far removed from the study and practice of the law; and neither by training nor by experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding and application of the various statutes and regulations which often come before them. Injustice may well result, and a sense of injustice is a grievous thing. I therefore think (and I have said as much before) that it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law. Parliament, of course, can make them so; but it is clear from the authorities to which my brethren refer in their judgments (which I have had the advantage of reading in advance) that a legislative intention to do so is not sufficiently expressed by the mere provision that the decision of such and such a tribunal shall be "final." I agree with, and desire to add nothing to, the judgments of my Lords on that subject. With regard to section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, however, I am clearly of opinion that the provision that "any "decision of a claim or question as provided by the foregoing "provisions of this section shall be final" means no more than that such decisions shall not be the subject of appeal or reference. This is shown by the opening words of the subsection: "Except "as provided by this Part of the Act or by the Family Allowances "Act, 1945," etc. Part III of the National Insurance Act, 1946, contains specific provisions for appeals in certain prescribed cases, and the Family Allowances Act, 1945, provides by section 5 for references as therein mentioned to one or more referees. The object, therefore, of section 36 (3) of the National Insurance Act, 1946, was merely to indicate which decisions (to the exclusion of others) might be the subject of an appeal or reference; the subsection is not concerned with, and is certainly not prohibiting, applications for orders for certiorari, which are neither appeals nor references. I accordingly agree with the order as proposed.

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[16] (1841) 1 Q.B. 467.
[17] Ibid. 474.
[18] (1878) 3 Q.B.D. 509.
[19] (1848) 12 Q.B. 527.

PARKER L.J. In this case Mr. Turner-Samuels moves on behalf of Robert Gilmore for an order of certiorari to bring up and quash a decision dated June 11, 1956, of a medical appeal

C. A.
1957

REGINA
v.
MEDICAL
APPEAL
TRIBUNAL.
Ex parte
GILMORE.

Parker L.J.

tribunal on the ground that there is a manifest error of law on the face of the record. Mr. Rodger Winn, for the Ministry of Pensions and National Insurance, and for the tribunal, concedes that such an error appears and does not oppose an order of certiorari. Before, however, making such an order, the court must be satisfied that it has jurisdiction to do so. That the tribunal erred in law is clear, and for the reasons given by my Lord I am satisfied that the error appears on the face of the record. The question, however, remains whether the court has jurisdiction to make the order.

The remedy by way of certiorari to quash the decision of an inferior tribunal for an error of law on the face of the record has been long established though sometimes overlooked: see *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.*[20] and *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw.*[21] It is an important jurisdiction, and though no doubt Parliament has the power in any case to deprive the courts of this supervisory jurisdiction it could, as I conceive the position, only do so by clear words. In the present case, unlike many others, the statute provides that the decision of the tribunal shall be final. Thus section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides that " Except " as provided by this Part of this Act . . . any decision of a " claim or question as provided by the foregoing provisions of this " section shall be final." As appears from the preceding subsections, decisions include decisions of medical appeal tribunals, which are accordingly final. It is to be observed that the decisions also include decisions of the industrial injuries commissioner, and the effect of the corresponding provision in regard to the commissioner of national insurance was specifically reserved in *Reg.* v. *National Insurance Commissioner, Ex parte Timmis.*[22]

One thing is clear beyond doubt. The ordinary remedy by way of certiorari for lack of jurisdiction is not ousted by a statutory provision that the decision sought to be quashed is final. Indeed, that must be so, since a decision arrived at without jurisdiction is in effect a nullity. This, however, is not so where the remedy is invoked for error of law on the face of the decision. In such a case it cannot be said that the decision is a nullity. The error, " however grave, is a wrong exercise of a jurisdiction which

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[20] (1878) 4 App.Cas. 30.

[21] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122 (C.A.).

[22] [1955] 1 Q.B. 139.

"he has, and not a usurpation of a jurisdiction which he "has not": see *per* Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[23] But is the statement that the decision shall be final sufficient to oust the remedy? There are many instances where a statute provides that a decision shall be "final." Sometimes, as here, the statute provides that subject to a specific right of appeal the decision shall be final. In such a case it may be said that the expression "shall be final" is merely a pointer to the fact that there is no further appeal, and the remedy by way of certiorari is not by way of appeal. Since, however, appeal is the creature of statute the expression is strictly unnecessary. In other cases the expression is used in the statutes when no rights of appeal are provided. In such a case it could be said that the expression was of no effect unless it was intended to oust the remedy by way of certiorari. Be that as it may, I am satisfied that such an expression is not sufficient to oust this important and well-established jurisdiction of the courts.

Not only is there no authority to the contrary, but Parliament has, I think, long recognized that the expression does not have that effect. As Lord Sumner points out in *Rex* v. *Nat Bell Liquors Ltd.*[24]: "Long before Jervis's Acts statutes had been "passed which created an inferior court, and declared its "decisions to be 'final' and 'without appeal,' and again and "again the Court of King's Bench had held that language of this "kind did not restrict or take away the right of the court to "bring the proceedings before itself by certiorari. There is no "need to regard this as a conflict between the court and Parlia-"ment; on the contrary, the latter, by continuing to use the "same language in subsequent enactments, accepted this inter-"pretation, which is now clearly established and is applicable "to Canadian legislation, both Dominion and Provincial, when "regulating the rights of certiorari and of appeal in similar "terms. The Summary Jurisdiction Act, 1848, was intended to "produce and did produce its result by a simple change in proce-"dure without unduly ousting the supervisory jurisdiction of the "superior court."

Further, it is to be observed that the analogous remedy of setting aside the award of an arbitrator for an error of law on the face of the award is available even though the submission is by section 16 of the Arbitration Act, 1950, deemed to contain a provision that the award is final.

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[23] [1922] 2 A.C. 128, 151–152.

[24] Ibid. 159–160.

C. A.
1957

REGINA
v.
MEDICAL
APPEAL
TRIBUNAL.
Ex parte
GILMORE.

Accordingly, though the matter has not been fully argued, I am satisfied that this court has jurisdiction in the present case to grant the order and that it should be made. No question of discretion arises since the applicant is clearly a party aggrieved.

Order of certiorari issued to quash the decision.

Solicitors: *Gaster & Turner for I. E. Geffen, Durham; Solicitor, Ministry of Pensions and National Insurance.*

M. M. H.

END OF VOL. I

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[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

INDEX

FFRAY. See Criminal Law.

PPEAL—Criminal—Jurisdiction as justices
o take recognizances to keep the peace. See
riminal Law—Affray.

RBITRATION — 16 years after Minister's
rder. See Limitation of Action.

ARRISTER — Conduct. See Libel and
lander.

ASTARDY — *Affiliation order — National*
ssistance — Application by National Assist-
nce Board for order against putative father—
other of illegitimate child married to putative
ather after birth of child—Child not legiti-
nated by marriage of parents—Mother of child
ot a single woman quoad putative father—
ight of board to order—National Assistance
ct, 1948 (11 & 12 *Geo.* 6, *c.* 29), *s.* 44 (2)—
astardy Laws Amendment Act, 1872 (35 &
6 *Vict. c.* 65), *s.* 3.
National Assistance Board *v.* Tugby
Divl.Ct. 506

REACH OF STATUTORY DUTY—Ventila-
ion. See Mines and Minerals.

UILDING—*Safety regulations—Excavations*
—Unknown pre-existing excavation—Injury to
orkman—Liability of employers—" Excava-
tion, pit or opening in the ground "—Build-
ng (Safety, Health and Welfare) Regulations,
948 (*S.I.* 1948, *No.* 1145), *reg.* 77.
Knight *v.* Lambrick Contractors Ltd.
C.A. 562

URDEN OF PROOF—*Standard of proof—*
ivil action—Allegation of fraud—Balance of
robability.
Fraud.
Hornal *v.* Neuberger Products Ltd.
C.A. 247

ERTIORARI. See National Insurance.

HILDREN AND YOUNG PERSONS —
pproved school order—Residence—Child resi-
ent in institution when order made—Home
n which he lived before entering institution no
onger in existence—Appropriate authority to

CHILDREN AND YOUNG PERSONS—*cont.*
be named in approved school order—Children and Young Persons Act, 1933 (23 *Geo.* 5, *c.* 12), *ss.* 70 (2) *and proviso*, 90 (2).
Barnsley Corporation *v.* Lancashire County Council - - - **Divl.Ct. 125**

COMPANY—Residence. See Practice and Procedure.

2. —— State of mind. See Landlord and Tenant.

COMPULSORY PURCHASE—*Compensation — Compensation for " disturbance " — House compulsorily purchased—Purchase price agreed between owner-occupier and acquiring authority—Expenses incurred by owner in purchasing new home—Whether expenses recoverable as compensation for disturbance—Acquisition of Land (Assessment of Compensation) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *rules* (1), (2), (5), (6).
Harvey *v.* Crawley Development Corporation - - - - - - - **C.A. 485**

2. —— *Compensation — Licensed inn — Licence put in suspense—Inn leased to brewers —Reversion to freeholders—Basis of compensation payable to freeholders—Value as licensed premises less value of suspended licence— Defence Acts*, 1842–1935—*Finance Act*, 1946 (9 & 10 *Geo.* 6, *c.* 64), *s.* 12, *Sch. I.*
Personal Representatives of Tull, decd. *v.* Secretary of State for Air - **C.A. 523**

3. —— *Compensation — War-damaged property—Total destruction of premises—Determination to make cost of works payment— Notional reinstatement—Assessment of compensation—" If the damage had been made " good "—Meaning—Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 53.
War Damage — Cost of works payment — Total loss—Discretion to make cost of works payment exercised—Decision communicated to landowner—Damage not made good—Compulsory purchase — Whether decision binding — War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *ss.* 8, 20 (1).
Paddington Borough Council *v.* War Damage Commission. Associated London Properties Ltd. *v.* Paddington Borough Council - - - - - - **C.A. 294**

CONFLICT OF LAWS—*Sovereign immunity — Corporate body — Separate legal entity — Whether department of State—Law applicable —Waiver of sovereign immunity—Submission to jurisdiction—Entry of appearance and order for security for costs without knowledge or authority of foreign sovereign — Ignorance of legal rights — Whether submission to jurisdiction.*
Waiver—Sovereign immunity.
Baccus S.R.L. *v.* Servicio Nacional del Trigo - - - - - - **C.A. 438**

CONSPIRACY—To commit acts abroad. See Criminal Law.

CONTEMPT OF COURT—*Mens rea—Newspaper article — Pending criminal proceedings — Article alleging criminal charges against defendant awaiting trial—Article calculated to prejudice fair trial—No knowledge by editor or reporter of pending proceedings—Whether mens rea necessary ingredient of contempt.*
Regina *v.* Odhams Press Ltd. *Ex parte* Attorney-General - - - **Divl.Ct. 73**

CONTRACT—Illegality. See Shipping.

2. —— *Seal—Corporation—Demolition contract with corporation not under seal—Whether enforceable—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 74 (2)—*Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 266.
Local Government.
A. R. Wright & Son Ltd. *v.* Romford Borough Council - **Lord Goddard C.J. 431**

CORPORATION—Seal. See Contract.

CRIMINAL LAW—*Affray—Terror of subject —No evidence that any person actually put in terror—Whether necessary where circumstances such as to frighten or intimidate reasonable people — Defence of self-defence — Whether material to charge of affray.*
Justices — Peace — Recognizances to keep— Jurisdiction—Her Majesty's judges as justices —Justices of the Peace Act, 1361 (34 *Edw.* 3, *c.* 1).
Criminal Law—Court of Criminal Appeal— Jurisdiction — Justices, as — Recognizances to keep peace—Justices of the Peace Act, 1361 (34 *Edw.* 3, *c.* 1).
Regina *v.* Sharp. Regina *v.* Johnson **C.C.A. 552**

2. —— *Conspiracy—Public mischief—Conspiracy to evade regulation — Relevance of acting "to prejudice the interests of honest "English traders"—Control of Goods (Import Certificates) Order,* 1951 (*S.I.* 1951, *No.* 1016).
Criminal Law — Conspiracy — Abroad, to commit acts — Conspiracy to defraud — Conspiracy in England to defraud persons in

CRIMINAL LAW—*continued.*

Germany — Whether an indictable offence in England.
Criminal Law—Forgery—Uttering—Meaning — Forged document enclosed in letter in London and sent to Germany—Whether document uttered in this country — Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 6 (2).
Regina *v.* Owen **Donovan J. and C.C.A. 174**

3. —— *Explosive substances — "Knowingly" possessing—Whether knowledge that substance is explosive necessary — Explosive Substances Act,* 1883 (46 *&* 47 *Vict. c.* 3), *s.* 4 (1).
Regina *v.* Hallam - - - **C.C.A. 569**

4. —— *Insanity — McNaghten Rules — Disease of the mind—Arteriosclerosis—Physical disease causing temporary lapse of consciousness—Whether a defect of reason—Trial of Lunatics Act,* 1883 (46 *&* 47 *Vict. c.* 38), *s.* 2 (1).
Regina *v.* Kemp - - - **Devlin J. 399**

5. —— *Self-defence—Onus of proof—Onus of establishing plea of self-defence not on accused—Unlawful wounding.*
Criminal Law—Wounding—Onus of proof —Self-defence.
Burden of Proof — Criminal case — Burden on prosecution throughout — Self-defence — Wounding.
Regina *v.* Lobell - - - **C.C.A. 547**

6. —— *Sentence — Preventive detention — Notice of intention merely to prove previous sentence of preventive detention defective— Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 23.
Regina *v.* Evans - - - **C.C.A. 35**

CROWN PRACTICE. See National Insurance.

CUSTODY—Remand for medical report where offence not punishable by imprisonment. See Justices.

DANGEROUS CHATTEL—Car. See Sale of Goods.

DANGEROUS PREMISES—Contractor. See Negligence.

DEFAMATION. See Libel and Slander.

DOCK—*Regulations—Shipbuilding—Dry dock —Several repairers contracting with shipowners — No notional occupier — Accident to shipowners' employee—Liability of shipowners —Shipbuilding Regulations,* 1931 (*S.R. & O.,* 1931, *No.* 133), "*Duties,*" *reg.* 10.
Factory—Persons benefited by regulations— "Person employed" — Seaman employed as yeoman carpenter by shipowners — Work of

DOCK—*continued.*

repair on ship in public dry dock—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 79—*Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10—*Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12).

Statute—Construction—Proviso—Exceptions. Judicial Precedent—Court of Appeal decision—Per incuriam—Whether point argued.

Bryers *v.* Canadian Pacific Steamships Ltd. - - - - - - **C.A. 134**

ESTOPPEL — Car registration book. See Sale of Goods.

EVIDENCE—Civil action. See Burden of Proof.

EXPLOSIVES. See Criminal Law 3.

FACTORY—*Dangerous machinery—Fencing—Horizontal milling machine—Machine completely fenced only while cutters in motion—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Horizontal Milling Machine Regulations*, 1928 (*S.R. & O.* 1928, *No.* 548), *regs.* 3 (1), 6.

Morris Motors Ltd. *v.* Hopgood **Divl.Ct. 30**

2. ——. See Dock.

FIRE—Escape of. See Negligence.

FORGERY—Uttering. See Criminal Law.

FRAUD. See Burden of Proof.

FRIENDLY SOCIETY. See Rates and Rating.

HUSBAND AND WIFE—Matrimonial home. See Rates and Rating.

ILLEGALITY—Contract. See Shipping.

INDUSTRIAL INJURY. See National Insurance.

INJUNCTION—Relator action. See Town and Country Planning.

INSANITY—McNaghten Rules. See Criminal Law.

JUSTICES—Recognizances to keep the peace. See Criminal Law—Affray.

2. —— *Remand—Jurisdiction—Summary offence not punishable by a sentence of imprisonment—Remand for medical report—Power of magistrates' court to remand in custody—Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 14 (3) (4), 26 (1), 105 (1) (*a*).

Boaks *v.* Reece - - - - **C.A. 219**

LANDLORD AND TENANT—*Act of* 1954—*Business premises (Security of Tenure)—Landlord's intention to occupy for own purposes—Purchase within five years—Meaning of "purchased"—Interest of landlord merged in freehold landlord's interest within five years of end of current lease—Whether landlord's interest "purchased"—Intention of company—How shown—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*), (2).

Company—Psyche—Intention—Landlord and tenant—Intention to occupy—State of mind of managers is state of mind of company—Landlord and Tenant Act, 1954, *s.* 30 (1) (*g*).

H. L. Bolton (Engineering) Co. Ltd. *v.* T. J. Graham & Sons Ltd. - - **C.A. 159**

2. —— *Act of* 1954 — *Business premises (Security of tenure)—Landlord's intention to reconstruct—"Reconstruct"—Proof of intention to change identity of business premises—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Percy E. Cadle & Co. Ltd. *v.* Jacmarch Properties Ltd. - - - - **C.A. 323**

3. —— Forfeiture — Effect pending relief. See Restrictive Covenant.

4. —— *Rent tribunal—Furnished premises—Assignee's reference—Whether assignee party to the contract—Furnished Houses (Rent Control) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).

Regina *v.* Tottenham and District Rent Tribunal. *Ex parte* Northfield (Highgate) Ltd. - - - - - - **Divl.Ct. 103**

5. —— *Repairs—Act of* 1938—*Mortgage—Leasehold—Mortgage by way of legal charge—Proceedings for forfeiture for breach of covenant—Notice of breach served on tenant and mortgagee—Counter-notice by mortgagee claiming benefit of Leasehold Property (Repairs) Act*, 1938—*No counter-notice by tenant—Proceedings for forfeiture against tenant commenced without leave of the court—Whether obligation to serve mortgagee—Whether tenant entitled to invoke mortgagee's counter-notice—"Lessee"—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 87, 146—*Leasehold Property (Repairs) Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

Mortgage—Leasehold, of.

Church Commissioners for England *v.* Ve-Ri-Best Manufacturing Co. Ltd. **Lord Goddard C.J. 238**

LIBEL AND SLANDER—*Libel—Practice—Trial—Jury—Justification—Evidence to rebut justification not given by plaintiff—Trial stopped by jury before conclusion of evidence for defence—Award of one farthing damages—Right of plaintiff to give evidence in rebuttal*

LIBEL AND SLANDER—*continued.*
of defence — Whether direction should have been given by judge to jury.
Practice and Procedure—Jury, civil action —Verdict—Plea of justification by defendants —Plaintiff's evidence in rebuttal not given—Intervention of jury before conclusion of defendants' evidence—Plaintiff's right to give evidence in rebuttal—Discretion of judge as to procedure.
Barrister—Conduct in court—Assistance to court—Continual bickering between counsel—Duty to ask court for directions on procedure.
BEEVIS *v.* DAWSON - - - - **C.A. 195**

LICENSING. See THEATRE.

LICENSOR AND LICENSEE—Contractor. See NEGLIGENCE.

2. —— *Special terms of licence—Warning notices—Liability of licensor for injuries to licensee—Dock estate—Part let to tenants and part retained in occupation of owners—Access to tenants' premises obtainable only over estate—Right of way giving access—Crossed by railway lines—Short cut—Used by tenants' employees with knowledge of owners — Employee injured through negligence of owners —Liability of owners—Effect of notices disclaiming liability for injury caused by owners' negligence.*
Negligence—Safe system of work—Access to place of work — Employer's premises wholly surrounded by private land — No means of access from public highway—Duty of employer to provide safe route to premises.
ASHDOWN *v.* SAMUEL WILLIAMS & SONS LTD. - - - - - - - **C.A. 409**

LIMITATION OF ACTION—*Local authority —Money claims made following alteration of boundaries—Arbitration 16 years after orders of Minister—Whether claims within provisions of Limitation Act and statute barred—Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 151—*Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1) (*d*), 27.
WEST RIDING COUNTY COUNCIL *v.* HUDDERSFIELD CORPORATION - **Lord Goddard C.J. 540**

LOCAL GOVERNMENT—Boundaries—Arbitration 16 years after order. See LIMITATION OF ACTION.

2. —— Contract—Seal. See CONTRACT.

MATRIMONIAL HOME. See RATES AND RATING.

MENS REA. See CONTEMPT OF COURT.

MINES AND MINERALS—*Coal—Breach of statutory duty—Ventilation—Accumulation of noxious gases due to insufficient ventilation—Mine ventilated by one mechanical fan—Fan stopped for maintenance during week-end — Obligation to provide continuous ventilation—Duty to provide other means of ventilation when fan stopped for repair—Notice posted by manager—Failure by deputy to carry out pre-shift inspection—Liability of manager—Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 29 (1), 75, 103 (2).
MCCARTHY *v.* LEWIS - - **Divl.Ct. 475**

MORTGAGE — Leasehold. See LANDLORD AND TENANT.

NATIONAL ASSISTANCE — Application by Board against putative father. See BASTARDY.

NATIONAL INSURANCE — *Industrial injuries benefit—Paired organ, injury to—Decision by medical appeal tribunal—Error of law on face of decision — Statute providing that " any decision of a claim or question . . . " shall be final "—Remedy by certiorari not taken away—National Insurance (Industrial Injuries) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 36 (2) (3), 40 (1)—*National Insurance (Industrial Injuries) (Benefit) Regulations*, 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5) — *National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations*, 1948 (*S.I.* 1948, *No.* 1299), *reg.* 13.
Crown Practice—Certiorari—Error of law on face of record—Report referred to in record incorporated in record — Inferior tribunal — Power of court to order completion of record —Statutory provision that " decision . . . shall " be final "—Remedy by certiorari not taken away save by express words.
REGINA *v.* MEDICAL APPEAL TRIBUNAL. *Ex parte* GILMORE - - - - **C.A. 574**

NEGLIGENCE—*Contractor—Duty to licensee —Duty to residents in and visitors to premises where work in progress — Normal means of access to house rendered impassable — Only alternative route dangerous—Injury to visitor using it—Liability of contractors.*
RIDEN *v.* A. C. BILLINGS & SONS LTD. **C.A. 46**

2. —— *Fire—Escape of—Fire due to negligence of workmen employed by occupier of premises—Liability of occupier for spread of fire to adjoining premises—Whether fire due to act of stranger.*
BALFOUR *v.* BARTY-KING. HYDER & SONS (BUILDERS) LTD., THIRD PARTIES - **C.A. 496**

3. —— Safe system of work—Access. See LICENSOR AND LICENSEE.

4. ——. See SALE OF GOODS.

PRACTICE AND PROCEDURE — *Appearance—Company—Principal office in London—Factory in Wales — Writ against company*

PRACTICE AND PROCEDURE—*cont.* *issued in Cardiff registry—Appearance entered in London—Application to set aside appearance—Whether company can reside or carry on business in more than one place—"Resides"—"Carries on business"—R.S.C., Ord.* 12, *rr.* 4, 5 (1) (2).
Residence—Company.
DAVIES *v.* BRITISH GEON LTD. - **C.A. 1**

2. —— Jury. See LIBEL AND SLANDER.

RATES AND RATING — *Drainage rate — When annual value "determined" — Rate based on Schedule A assessment signed and allowed by commissioners — Appeal against assessment pending—Land Drainage Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 29—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 35, 41.
Revenue—Income tax—Schedule A.
B. P. REFINERY (KENT) LTD. *v.* KENT RIVER BOARD. SAME *v.* LOWER MEDWAY INTERNAL DRAINAGE BOARD - - - - **Divl.Ct. 84**

2. —— *Rateable occupation — Matrimonial home—Husband leaves wife in house rent free—Beneficial occupation by husband.*
CARDIFF CORPORATION *v.* ROBINSON **Divl.Ct. 39**

3. —— *"Social welfare"—Friendly society—Convalescent home—Society providing benefits and assurance for members—Benefits provided on actuarial basis—Claim by society for rating relief—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.
Friendly Society.
TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL **Divl.Ct. 531**

RESIDENCE—Company. See PRACTICE AND PROCEDURE.

2. ——. See CHILDREN AND YOUNG PERSONS.

RESTRICTIVE COVENANT — *Obsolete — Modification — Application by tenant to discharge or modify—Whether covenants "obsolete" — Whether power of tribunal discretionary—Issue of writs for forfeiture—Whether tenant thereafter "person interested"—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (12).
Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Effect of forfeiture pending relief.
DRISCOLL *v.* CHURCH COMMISSIONERS FOR ENGLAND - - - - - - **C.A. 330**

REVENUE. See RATES AND RATING.

ROAD TRAFFIC—Car registration book. See SALE OF GOODS.

SALE OF GOODS — *Nemo dat quod non habet—Estoppel—Motor-car—Car and registration book handed over to professed intending buyer — Subsequent fraudulent sale — Claim for damages by true owner against buyers—Whether true owner estopped—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 21 (1).
Estoppel — Conduct, by. Road Traffic — Registration book.
CENTRAL NEWBURY CAR AUCTIONS LTD. *v.* UNITY FINANCE LTD. MERCURY MOTORS, THIRD PARTIES - - - - **C.A. 371**

2. —— *Warranty—Hire-purchase agreement—Sale of second-hand car—Dealer's express warranty of condition to buyer—Car in dangerous condition sold by dealer to finance company — Hire-purchase agreement between company and buyer—Buyer injured in collision caused by dangerous condition of car—Breach of warranty—Enforceability against dealer—Measure of damages—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1).
Negligence—Dangerous thing—Car in dangerous condition — Condition discoverable by reasonable diligence on the part of supplier — Buyer injured in collision — Liability of supplier.
ANDREWS *v.* HOPKINSON - **McNair J. 229**

SHIPPING — *Charterparty — Demurrage — Time waiting for berth—"If . . . discharging "place . . . not immediately available, demur- "rage in respect of all time waiting thereafter "shall be paid"—Congestion in only dock—Ship not allowed to enter port—Dock authorities' order that ship should anchor at customary waiting place 22 miles outside port—Customary waiting place not within legal geographical or fiscal limits of port—Ship not an "arrived" ship for purposes of time for discharge—Demurrage payable in respect of time spent at customary waiting place.*
ROLAND-LINIE SCHIFFAHRT G.m.b.H. *v.* SPILLERS LTD. - - - - **Sellers J. 109**

2. —— *Load line—Overloading—Contravention of statute—Effect on contract of carriage — Whether shipowner entitled to recover freight—Merchant Shipping (Safety and Load Line Conventions) Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *ss.* 44, 57.
Contract—Illegality—Contract prohibited by statute.
ST. JOHN SHIPPING CORPORATION *v.* JOSEPH RANK LTD. - - - - **Devlin J. 267**

STARE DECISIS. See DOCK.

STATUTE—Construction. See DOCK.

STATUTORY DUTY—Breach—Ventilation. See MINES AND MINERALS.

STATUTORY DUTY—*continued.*

2. —— Breach. See BUILDING — Safety regulations.

THEATRE—*Licence—Rules—Condition prohibiting the sale of liquor and tobacco in theatre—Theatre continuously licensed for sale of liquor and tobacco—Application for renewal of licence on same terms as before—Proximity of licensed premises to theatre—Whether distinction between application for renewal and application for grant of licence for first time —Proximity of licensed premises a factor to be taken into account—" Rules for ensuring " order and decency "—Prohibition of sale of tobacco—Theatres Act*, 1843 (6 *&* 7 *Vict. c.* 68), *ss.* 5, 9.

REGINA *v.* FLINTSHIRE COUNTY COUNCIL COUNTY LICENSING (STAGE PLAYS) COMMITTEE. *Ex parte* BARRETT - - - - **C.A. 350**

TOWN AND COUNTRY PLANNING—*Development—Enforcement notice—Development carried out before permission withdrawn—Notice to discontinue use of land as caravan site—Validity of notice—Town and Country Planning General Development Order*, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3, 4.

COLE *v.* SOMERSET COUNTY COUNCIL **Divl.Ct. 23**

2. —— *Enforcement notice — Non-compliance—Repeated offences under Town and Country Planning Act*, 1947, *s.* 24 (3)—*Infringement of public right—Relator action by Attorney-General—Remedy by way of injunction—Jurisdiction—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24 (3).

Injunction — Relator action — Attorney-General's discretion. Attorney-General — Functions—Administrative discretion.

ATTORNEY-GENERAL *v.* BASTOW **Devlin J. 514**

WAIVER—Of sovereign immunity. See CONFLICT OF LAWS.

WAR DAMAGE. See COMPULSORY PURCHASE.

BIBL.
LONDIN.
UNIV.

VL. 8.5.18